

BOOKS Printed for D. Brown in Exeter Exchange in the Strand; T. Ward in the Inner-Temple Lane; and W. Meares at the Lamb without Temple-Bar.

THE *Persian and Turkish Tales* Compleat, Translated formerly from those Languages into *French* by M. *Petis de la Croix*, Dean of the King's Interpreters, Reader and Professor in the Royal Colledge at *Paris*, and now into *English* from that Translation by the late Learned Dr. *King*, and several other Hands. To which are added, two Letters from a *French* Abbot to his Friend at *Paris*, giving an Account of the Island of *Madagascar*, and of the *French* Ambassador's Reception by the King of *Siam*. In two Volumes:

Ouranography, or *Heaven opened*, the Substance of Cardinal *Bellarmino's* five Books concerning the Eternal Felicity of the Saints. Published in *Latin*, and now made *English* with some few Variations, by *B. Jenks*, Rector of *Harley* in *Shropshire*, and Chaplain to the Right Honourable the Earl of *Bradford*.

The Art of Prudence, or a Companion for a Man of Sense, written originally in *Spanish* by that Celebrated Author *Balthazar Gracian*, now made *English* from the best Edition of the Original, and illustrated with the *Sieur Amelot de la Haussain's* Notes; by *Mr. Savage*. The 3d Edition.

General Observations and Prescriptions in the Practice of Physick on several Persons of Quality; by an Eminent *London* Physician, who was Contemporary with Dr. *Gifford*, Dr. *Ridgely*, Dr. *Mevear*, Dr. *Andrews*, and Sir *Theodore Mayerne*. Physicians in ordinary to King *James* and King *Charles* the first; Inscribed to Sir *Samuel Garth*, Knt.

A Philosophical Enquiry into some of the most considerable Phenomena's of Nature, in two parts, whertin first the Divine Nature, with the Order, Causes, and ultimate End of the Creation, and particularly the Human Nature, are considered; and secondly, the Nature of the World, with the Progress of her ordinary Course in Producing, Multiplying, and Changing her various Species are briefly Stated, likewise a touch on her Defects, with Regard to Maladies in Animal Bodies, and how and of what the same are formed, with a hint to avoid Dangers in the Rosacrucian Navigation, the whole Conformable to the Doctrine of Fermentation.

Essays of *Michael Seigneur de Montaigne*, in three Books, with Marginal Notes and Quotations. And an Account of the Author's Life. With a short Character of the Author and Translator; by a Person of Honour. Made *English* by *Charles Cotton*, Esq. In Four Volumes 8vo. The Fourth Edition, with the Addition of a compleat Table to each Volume, and a full Defence of the Author.

BOOKS Printed for D. Brown in Exeter Exchange in the Strand; T. Ward in the Inner-Temple Lane; and W. Meares at the Lamb without Temple-Bar.

THE *Persian and Turkish Tales* Compleat, Translated formerly from those Languages into *French* by M. *Petis de la Croix*, Dean of the King's Interpreters, Reader and Professor in the Royal Colledge at *Paris*, and now into *English* from that Translation by the late Learned Dr. *King*, and several other Hands. To which are added, two Letters from a *French* Abbot to his Friend at *Paris*, giving an Account of the Island of *Madagascar*, and of the *French* Ambassador's Reception by the King of *Siam*. In two Volumes:

Ouranography, or *Heaven opened*, the Substance of Cardinal *Bellarmino's* five Books concerning the Eternal Felicity of the Saints. Published in *Latin*, and now made *English* with some few Variations, by B. *Jenks*, Rector of *Harley* in *Shropshire*, and Chaplain to the Right Honourable the Earl of *Bradford*.

The Art of Prudence, or a Companion for a Man of Sense, written originally in *Spanish* by that Celebrated Author *Balthazar Gracian*, now made *English* from the best Edition of the Original, and illustrated with the *Sieur Amelot de la Haussain's* Notes; by Mr. *Savage*. The 3d Edition.

General Observations and Prescriptions in the Practice of Physick on several Persons of Quality; by an Eminent *London* Physician, who was Contemporary with Dr. *Gifford*, Dr. *Ridgely*, Dr. *Mevear*, Dr. *Andrews*, and Sir *Theodore Mayerne*. Physicians in ordinary to King *James* and King *Charles* the first; Inscribed to Sir *Samuel Garth*, Knt.

A Philosophical Enquiry into some of the most considerable Phenomena's of Nature, in two parts, whertin first the Divine Nature, with the Order, Causes, and ultimate End of the Creation, and particularly the Human Nature, are considered; and secondly, the Nature of the World, with the Progress of her ordinary Course in Producing, Multiplying, and Changing her various Species are briefly Stated, likewise a touch on her Defects, with Regard to Maladies in Animal Bodies, and how and of what the same are formed, with a hint to avoid Dangers in the Rosacrucian Navigation, the whole Conformable to the Doctrine of Fermentation.

Essays of *Michael Seigneur de Montaigne*, in three Books, with Marginal Notes and Quotations. And an Account of the Author's Life. With a short Character of the Author and Translator; by a Person of Honour. Made *English* by *Charles Cotton*, Esq. In Four Volumes 8vo. The Fourth Edition, with the Addition of a compleat Table to each Volume, and a full Defence of the Author.

H. GROTIVS

Of the RIGHTS of
WAR and PEACE,

IN THREE VOLUMES;

In which are explain'd

**The LAWS and CLAIMS of
NATURE and NATIONS,**

**AND THE
Principal Points that relate either to
Publick Government, or the Conduct
of Private Life.**

Together with the

AUTHOR'S own NOTES.

*Done into English by several Hands; with the Ad-
dition of the Author's Life by the Translators.*

*Dedicated to His ROYAL HIGHNESS the
PRINCE of WALES.*

VOLUME the SECOND.

L O N D O N: Printed for D. BROWN in *Exeter*
Exchange in the Strand, T. WARD in the *Inner-*
Temple Lane; and W. MEARES at the *Lamb with-*
out Temple-Bar. MDCCLXV.

H. G. R. O. P. I. S.

Of the RIGHTS of

WAR and PEACE

IN THREE VOLUMES

In which are explained

THE LAWS and CLAIMS of

NATURE and NATIONS

AND THE

Principal Points that relate either to

Public Government, or the Conduct

of Private Wars

Together with the

AUTHOR'S own NOTES

Done into English by James Oglethorpe, with the Ad-

dition of the Author's life by the Translator

Dedicated to His Royal Highness the

PRINCE OF GEORGES

VOLUME the SECOND

LONDON: Printed for D. Milnes in Fleet-

Street, in the Strand, 1765. in the Power

of the Commons, and at the University

of Cambridge



H. G R O T I U S,

OF THE

Rights of WAR and PEACE.

B O O K II.

CHAP. I.

Of the Causes of War; and first, of the Defence of Persons and Goods.

I. I.



ET us now proceed to the ^{1. What} Causes of War, I mean such as ^{Causes of War may be termed} are properly said to *justify* it: ^{justifiable.} for there are some that engage us by the Prospect of an *Advantage*, and these usually differ from those that move us from a Sense of *Justice*. Which, both from *each other*, and from the (a) *Principles*.

VOL. II.

B

(a) *Principles or Occasions of War*. Virgil calls them, *Beginnings of Battle*.

or *Occasions* of War (as was the *Hart* in the War betwixt *Aeneas* and *Turnus*) *Polybius* has very accurately distinguish'd; for as obvious as the difference of these things appears, yet the Terms are so commonly confounded, that what we call *justifying Reasons*, are called by *Livy* the *Principles* of War.

(b) You are certainly Romans (says he) who only to the Justice of your Wars do attribute their Success, who glory not so much in the Conquests you have made, as that the Causes of your Wars were Justifiable. In which Sense *Ælian* styles them ἀρχὰς πολέμων, the Foundations of War. And *Diodorus Siculus* treating of the War of the *Lacedemonians* with the *Ælians*, (c) προφάσεις and ἀρχὰς, Evident Causes and Principles.

2. And these justifying Reasons are indeed our proper Subject here, where it will be no ways impertinent to mention that of *Coriolanus* in *Dyonisius*, Let it be your principal Care, that the Cause of your War be just and honourable. And *Demosthenes*, As in the Building of Houses, Ships, &c. the (d) Foundations

(b) You are certainly Romans.] Scarce any Nation ever stood so long, considering the Causes and Merits of a War. *Polybius* in *Scidas* upon the Word ἐμπεδυνεῖν: οἱ δὲ Ῥωμαῖοι, &c. For the Romans always took a very particular Care never to attack their Neighbours first, but to be thought on the Defensive only, when they engaged their Enemies. *Dion* shews this by a handsom Comparison of the Romans with *Philip* the *Macedonian*; and *Antiochus* in his *Pierresian* Collections. Another of that kind is in his Collections of Embassies, Στὰ τὰς παλαίσ, &c. Formerly nothing was so much regarded, as that their Wars might be Just. And again in the *Pierresian* Collections, σφοδρὰ οἱ Ῥωμαῖοι, &c. The Romans were very Ambitious of engaging in just Wars, and determin'd nothing that related to them rashly, and in a hurry.

(c) Προφάσεις.] *Procopius Gothic.* III. calls them δμασμάλα, Justifications. See also lower in this Book, at the beginning of the *xxiiid* Chap.

(d) Foundations.] So *Julian* in his *Ild B.* of the Praises of *Constantinus*, styles it ὑπόθεσις, Belli, The Foundation of a War.

dations ought to be firm and solid: So all our Actions and Enterprizes whatever should be founded on the substantial Basis of Truth and Justice. Thus too *Dion Cassius*, Nothing shou'd be so truly our Care as a Regard to Justice; for if we act upon this Motive, our Arms may give us Hopes of Victory; but if not, we can promise our selves no certainty, tho' at first ev'ry thing succeeds to our Wishes. So also says *Tully*, Those Wars are unjust that are without Foundation; and reproves *Crassus*, That he should pass the *Euphrates*, When there was not the least (e) Grounds for a War.

3. What has been said of Publick Wars may with the same Reason be applied to Private. It is a Complaint of *Seneca*, That we can punish Homicides, and yet can smile at the Destruction of a whole Nation: Ambition and Tyranny have no Limits; by the Authority of Senate and People are Barbarities acted, and (f) what is condemned in Private Persons is enjoin'd by the Publick. 'Tis true, those Wars that are commenced by Publick Authority have some appearance of Right, as a Sentence ratified by a Judge: of which hereafter. But are therefore not less Criminal, if begun without a just Foundation. Thus was *Alexander*, for unjustly invading the *Persians*, and other Nations, deservedly reproached by

B 2

the

(e) Grounds for a War.] *Appianus* says, that the same *Crassus* was charged by the Tribunes *μη πολεμεῖν τοῖς Παρθυσίοις μηδ' ἐν ἀδικίᾳ*. Not to fight with the Parthians, who had done no manner of Injury. And *Plutarch* of the same General. *καὶ συνίστατο πολλοὶ*. &c. A great many were got together, dissatisfied that any one should go to invade People who had done no Injury at all, and at the same time were at Peace, and in Alliance with them.

(f) What we privately Condemn, we transact in Publick.] The same *Seneca* of Anger, B. 2. Chap. 8. Those things which are Crimes as long as they can be suppressed, are afterwards reputed Glorious and Honourable. See lower, out of *Seneca* and *St. Cyprian*, B. 3. Ch. 4. about the end of the 5th §.

the *Scythians* in *Curtius*; and by *Seneca* and *Lucan* branded with the Opprobrious Names of (g) *Thief* and *Robber*; by the *Indian Magi* he was called *Villain*, and by a *Pirate* was told he was the same himself. So *Justin*, making mention of his Father *Philip*, said, that two Kings of *Thrace* were de-thron'd by the *Fraud* and *Villany* of a *Thief*. To which may be referred that Passage of *St. Austin*, *What are Kingdoms without Equity, but so many great Robberies?* So that of *Lactantius*, *That being seduced by the Charms of Vain-glory, they miscall their Vices by the Name of Virtue;*

4. There is therefore no other Reasonable Cause of making War, but an *Injury* received. So says *St. Austin*, An Offence committed by the adverse Party is the Occasion of a *Just War*. So the *Roman Herald*, *I declare, and call you to witness*, says he, *that That People has acted unjustly, and does not make us due and proper Satisfaction.*

II. *Justifiable Causes of War are, when for Defence; for the Recovery of one's Property or one's Debts; or for the Punishment of an Offence committed.*

II. 1. Now, as many Sources as there are of *Judicial Actions*, so many Causes may there be of *War*. For where just Determinations cease, War begins. Now in Law there are Actions for Injuries not yet done, or for those already committed. For the First, When Securities are demanded to prohibit any future Injuries, or Acts of Violence: For the Second, That the Injuries already done us may be punish'd, or recompence given to the injured Person, both which are (b) excel-

(g) *Thief* by *Seneca*] The Passage is in his B. 1. Ch. 13. of *Benefits*. *Justin Martyr* in his 2d Apolog. not unelegantly, τοῦτον ὁ Ἰσχυρῆς, &c. *Princes, who prefer Opinion to Truth, can do as much Mischief as Thieves in a Desert.* And *Philo*, οἱ τὰς μεγάλαις, &c. *Who commit great Robberies, and under the venerable Name of Government conceal what is more truly, and in fact Theft and Roguery.*

(b) *Excellently distinguished by Plato*] And before him *Homer*. For when *Penelope's* Adressers were willing to submit to any Fine or Demand, *Ulysses* is introduced declaring himself thus,

Οὐκ ἐστὶ μοι παρὼν, &c.

Chap. I. WAR and PEACE.

excellently distinguished by *Plato*; but as for Reparation, it belongs to what is or was properly *our own*, from whence *Real* and *Personal* Actions do arise, or to what is properly *our due*, either by *Contract*, by *Default*, or by *Law*. To which also we may refer those things which are said to be due by a *sort of Contract*, or a *sort of Default*. From which Heads all other *Personal* Actions are deriv'd. The *Fact to be punished* produces *Indictments* and *Public Verdicts*.

2. Most Men assign three just Causes of War, Defence, the Recovery of what's *our own*, and Punishment: Which three you have in *Camillus's* Denunciation against the *Gauls*. *Omnia quæ defendi repetique & ulcisci fas est*; whatever may be defended, recovered or revenged; in which Account, if the word *Recovered* be not taken in a greater Latitude, it will not include the exacting of that which is our due; which Exaction was not omitted by *Plato*, when he said, *That War was not only necessary, if any Man shou'd be either Violently oppress'd, or plundered; but also if imposed upon, or treated in any fraudulent manner.* To which agrees that of *Seneca*, *It is a very equitable Saying, and founded on the Law of Nations, Pay what you owe.* And it was a Part in the Form used by the *Roman Herald*, *That they neither gave, paid, nor did, what they ought to have given, paid and done:* And as *Salust* has it in his History, *I demand my own by the Law of Nations.*

B 3

No! tho' you'd All, you've Robb'd me of, restore,
And give me off, what's'er I'd ask for more;
Your Blood I'll have, nor ever think I'm paid,
Till by your Deaths a Satisfaction's made
For all your Crimes.

And *Cassiodorus*, B. 5. Epist. 35. *As we have laid aside all Revenge, let us not think of the Injury.* Add to this what is lower in this B. at the beginnings of the 16th and 20th Ch.

ons. St. *Austin*, when he said, that *those Wars which are to revenge our Injuries, are (i) generally term'd Just*; he took the Word *Revenge* in the larger Sense for making *Restitution*, which appears in the Sequel, where there is not so much an Enumeration of the Parts, as an Illustration by Examples. So, says he, *That Nation or City may be invaded, that shall neglect to punish what's wrongfully done by their own Subjects, or to restore what's unjustly taken from another.*

3. Conformable to this did the *Indian King* (as *Diodorus* informs us) accuse *Semiramis*, that she had *Commenced War against him, without having received any manner of Injury*. Thus the *Romans* argued with the *Senones*, that they ought not to make War on a People that had given 'em no reasonable *Provocation*. *Aristotle* observes, that *Men usually make War on those who are the first Aggressors*. So *Curtius* speaking of the *Asian Scythians*, They were reputed the most *Innocent* of the *Barbarians*; they never took up Arms, (k) but when highly provoked; the first Cause therefore of a *Just War*, is an *Injury*, which tho' not done, yet threatens our *Persons* or our *Estates*.

III. We

(i) Generally termed just.] *Servius* at the 9th *Enclid*, of the *Romans*, when they intended to declare War, the *Chief Herald* went to the *Borders* of the *Enemies Country*; and after some solemn *Preface* said with a distinct Voice, that he then declared War against 'em for such and such *Reasons*, either because they had injured their *Allies*, or had not restored the *Cattle* they had stoln, or delivered *Offenders* up.

(k) But when highly provoked.] *Plutarch's Nicia*, & *St. Hecaleæ*, &c. *Hercules* was always *Conqueror* when he was first assaulted, and only acted in his own *Defence*. And *Josephus*, in the 11th Book of the *Jewish History*, οἱ ἀπαρδόντες & μὴ, &c. Those who come and begin *Hostilities* upon People who expect no such thing, force them even against their Inclination to fly to Arms in their own *Defence*.

III. We have before observed, that if a Man is assaulted in such a manner, that his Life shall appear in inevitable Danger, he may not only make *War* upon, but very justly *destroy* the *Aggressor*; and from this Instance, which every one must allow us, it appears that such a *private War* may be *just and lawful*; for it is to be observed, that this *Right* or *Property* of *Self-defence* is what *Nature* has implanted in every Creature, without any regard to the *Intention* of the *Aggressors*; for if the Person be no ways to blame, as for Instance, a *Soldier upon Duty*; or a Man that should *mistake me* for another, or one *Distracted*, or a Person in a *Dream*, (which may possibly happen) I don't therefore lose that *Right* that I have of *Self-defence*; for it is sufficient that I am not obliged to suffer the Wrong that he intends me, no more than if it was a Man's *Beast* that came to set upon me.

III. War
in Defence
of Life, Law-
ful.

IV. 1. It is a matter of Dispute, whether we may *kill* or *trample* on *Innocent* Persons, who shall hinder that *Defence*, or *Escape*, that is absolutely necessary for the *Preservation* of our Lives. There are some even among *Divines* who think it *lawful*. And certainly, if we have regard to *Nature* only, the Respect that we owe to *Society* in general, is of less moment than the *Preservation* of our *selves*; but the Law of *Charity*, especially the *Evangelical*, which has put our Neighbour upon a level with our selves, does plainly not permit it.

IV. But
only against
the Aggres-
sor.

2. It was well observed of *Aquinas*, if apprehended rightly, that in our own Defence we do not *purposely* kill another; not but that it may be sometimes lawful, if all other means prove ineffe-ctual, to do that *purposely* by which the *Aggressor* may *die*; not that this *Death* was so much our *Choice*, or *Primary* Design (as in Capital Punish-ments), but the only Means we had then left to preserve our selves; nay, and even then, one would

with, if possible, rather to fright or disable him, than to be obliged, even by meer Necessity, to kill him.

V. In a present and certain Danger, but not in such a one as is only matter of Opinion.

V. 1. But here 'tis necessary (1) that the Danger be present, and as it were immediate; for I grant, if a Man takes Arms, and his Intentions are visibly to destroy another, the other may very lawfully prevent his Intentions; for as well in Morality, as the Laws of Nature, there is no Rule but what admits of some Latitude: For they are highly mistaken, and deceive others, who presume that a Man's fearful Apprehensions may be a just Reason that he should kill another. 'Tis very justly observed by Cicero, that there are many Inconveniences proceeding from Fear, when a Person shall intend some Injury to another, meerly out of Fear that if he should omit that Opportunity, he may possibly endanger his own Safety. So Clearchus in Xenophon, *κ. ὁ δὲ α, &c.* I have known many People moved either by some false Report, or by Suspicion, who for fear of others, and to be before-hand with them, have done irreparable Injuries to those, who never would have offered, nor ever design'd to offer them any Hurt in the world. So Cato in his Oration for the Rhodians, Shall we our selves be first guilty of that, for which we so freely accuse others? It was excellently said by Aulus Gellius, That a Gladiator's Condition is such, that he must either kill or be killed; but as for Man's Life, it is not under such unhappy Circumstances, that we must be necessitated either to do an Injury, or else to bear one. And as Tully in another place no less admi-

(1) That the Danger be present.] The excellent use of this Distinction see in Agathias B. 4. And Phrynichus in Thucydides, B. 8. *ὅτι ἐν ἐπιδόξῳ.* &c. 'Tis a Circumstance far from deserting Censure, for him who is brought in danger of his Life by them, to do any thing rather than be destroyed by those worst of Enemies.

admirably expresses it, *Who ever made such a Law, or to whom cou'd it be allowed without the greatest Inconvenience, that a Man may lawfully destroy another, thro' a Pretence of Fear, lest the other should afterwards kill him? To which this Passage of Euripides may be applied,*

Ἐγὼ δ' οἰμειλλέω, &c.

*You say in Time he'll kill you, stay
Till that Time comes.*

So *Thucydides*, *What is to come is yet uncertain, nor should any one be so far transported with the Apprehensions of what may happen, as to engage in a certain and present Quarrel.* So the same *Thucydides*, where he speaks of the many Ills that *Sedition* had brought upon the Cities of *Greece*, mentions this one in particular, *That it was thought commendable in a Man to do any act of Villany that another had intended to do before him.* And *Livy*, (m) *Men to secure themselves from Fear, become themselves formidable; and, as if there were a Necessity, either of doing or receiving Wrong, we ease our selves, and oppress others.* Against whom that of *Vibius Crispus*, so much celebrated by *Quintilian*, would be no ways improper, *Who gave you an Authority thus to fear?* So *Livia* in *Dion*, *They can never come off with Honour, who are guilty of the Crimes they apprehend from others.*

2. If then I am not threatened with any present Danger, if I only discover that somebody has laid a Plot and Ambuscade against me, that he designs to
poison

(m) *Men to secure themselves from Fear, become themselves formidable.] As Caesar, who when he had seiz'd the Government, said he was obliged to it for Fear of his Adversaries. There is an admirable Passage of this in Appian, Civil. 2.*

poison me, or by Suborning Witnesses to procure an Unjust Sentence against me, why, in this Case I must not kill him; if either such a Danger can be possibly avoided any other way, or at least, that it does not *then* sufficiently appear that it may not be avoided. For Time gives us frequent Opportunities of Remedy, and there may many Things happen, as the Proverb has it, *betwixt the Cup and the Lip*. Tho' there are both Divines and Lawyers, who are a little too Indulgent in this Affair: However, the other Opinion, which is certainly the safer and better, is not altogether destitute of Authority.

VI. For
the Preser-
vation of a
Limb or a
Member.

VI. But what shall we then say of the Danger of losing a Limb, or a Member? When a Member, especially if one of the Principal, is of the highest Consequence, and even equal to Life itself; and 'tis besides doubtful whether we can survive the Loss; 'tis certain, if there be no possibility of avoiding the Misfortune, the Criminal Person may be lawfully and instantly kill'd.

VII. Es-
pecially in
Defence of
Chastity.

VII. That the same may be done on account of Chastity, can scarce be here any matter of Dispute; when not only the Opinion of the World, but even the Law of God, has made it (n) Equivalent to Life it self. So Paulus the Lawyer, that to defend ones Chastity, tho' with the Death of him who

(n) Equivalent to Life it self.] Seneca of Benefits, B. 1. Ch. 11: Next to these are what indeed we can live without, but in such a manner that Death is preferable, as Freedom, Chastity, and a good Conscience. Paulus in his 3th of Sentences, Tit. 23. He who kills a Thief, that attempts to murder him, or any body else that endeavours to ravish him, ought not to be punished; for the one defends his Life, the other his Chastity by a publick and justifiable Act. St. Austin in his B. 1. of Free-will. The Law empowers a Traveller to kill a Highwayman, lest he himself should be murdered by him; or any Man or Woman, if they can, to kill a Ravisher, either before or after the Rape is committed.

who would *Violate* it, is but an Act of *Justice*. We have an Example of this in (o) *Cicero* and *Quintilian*, in the Person of one of *Marius's* Tribunes, who was *killed* by a Soldier. Among Women who have vindicated their Chastity, *Heliodorus* records that act of *Heraclea*, which he calls ἀμύνης νόμον, &c. *A just Defence of her Injured Honour*.

VIII. Tho' some agree with me in what I observed before, that tho' I may lawfully kill him who attempts to take away my Life, 'tis more commendable (more suitable to the *Genius* of the Gospel) sometimes to *die ones self* than to kill another: Yet they will only grant it upon this Condition, that we except Persons of *Note* and *Importance*. But for my part, I think it no ways proper to impose a Law so contrary to *Christian Patience*, upon all those whose Lives are of *Advantage* to others, and therefore I think this ought to be limited to those only whose particular Office and Duty it is to defend others, as to those with whom we have contracted as *Guards* to defend us on our Journeys, or to publick *Magistrates*; to whom we may apply that of *Lucan*,

VIII. Self-Defence may sometimes be omitted.

(p) *When Numbers on such a precious Breath depend
For Life and Safety, and so large a World
On you alone has all its Value fix'd;
Willingness to die is barb'rous Cruelty.*

IX. 1. It

(o) In *Cicero*.] See *Plutarch* too in the Life of *Marius*. So *Marius* is said to be acquitted by the Judgment of the Gods, for murdering him who had ravished his Daughter; as is testified by *Apollodorus* 3. *Bibliotheca*. Add to this a remarkable Story in *Gregory of Turin* B. 9.

(p) *When Numbers depend, &c.*] *Curtius* B. 10. But when you so eagerly offer your self to such apparent Dangers, you forget how many Citizens Lives you at the same time hazard, and involve in your Misfortune.

IX. self-
Defence a-
gainst a
Person very
useful to the
Publick, a
Crime from
the Law of
Charity.

IX. self-
Defence a-
gainst a
Person very
useful to the
Publick, a
Crime from
the Law of
Charity.

VIX. 1. It may happen on the contrary, that because the *Aggressors* Life may be serviceable to many, it would be certainly *Criminal* to take it from him; and this not only by the *Divine* Law, both of the *Old* and *New* Testament, which we have already instanced in, when we shewed that the *King's* Person is always *Sacred*, but also by the very *Law of Nature*. For the *Law of Nature*, consider'd as a *Law*, does not only respect what we call *Expletive* Justice, but comprehends the Acts of *Virtues*, as of *Temperance*, *Fortitude* and *Prudence*; so that in certain Circumstances they are not only *honest*, but even *obliging*. Besides that, as to what we were now speaking of, *Charity* does also oblige us.

2. Neither am I ever the less of this Opinion on account of what *Vasquez* asserts, that a *Prince* who shall injure an *Innocent* Person, is ipso facto no more a *Prince*; a Proposition not only absurd, but even very dangerous too. For as *Right* and *Property*, so *Sovereignty* is not lost by an *Evil* Action, unless it be stipulated by some particular Law; but what *Law* was there ever enacted that *Kings* should be *dethroned* for a *Injury* done to a *private* Person? Surely there is no such *Law* yet in being, nor I believe ever will, for what a *Confusion* wou'd it make? But what *Vasquez* lays down as the *Foundation* for this, and other *Conclusions* of the like Nature is, that *all Governments* regard the *Good* of the *People*, and not that of the *Prince*; which, were it *universally* true, wou'd be nothing to the purpose. For the *Benefit* of a thing does not entirely cease, because it is not in every respect so profitable as before. What he further urges, that every *Man* does only for his *own* sake with *well* to the *Commonwealth*, and that therefore he ought to prefer his *own* Good to that of the *Publick*, is something inconsistent. 'Tis true, every *Man* will for

for his own *Safety* with well to the *Commonwealth*, but that not only for his own *Advantage*, but for that of *others*.

3. For it is a wrong Notion, and rejected by all Men of Sense, that (q) *Friendship* proceeds only from *Want* and *Insufficiency*, when we find we are prompted to it by *Nature*, and the free *Impulse* of our own *Minds*. And to prefer the *Advantage* of many Persons to my own single *Interest*, is what *Charity* often advises, sometimes commands. So *Seneca*, 'Tis no wonder that (r) *Kings and Princes*, and whoever they are, or whatever Title they bear, who are the *Guardians* of *Publick Trust and Safety*, should be more highly respected than our private *Friends and Relations*; for if 'tis agreed by all wise Men, that a *Publick Good* should rather be consulted than any *Private Interest* whatever; it follows, that nothing should be dearer to us than the Person of him on whom the *Welfare* of *All* does so immediately depend. *St. Ambrose* says, that he who defends a whole Nation from *Ruin* is more worthy our *Esteem*, than he who secures us from any particular *Dangers* of

(q) *Friendship* proceeds only from *Want* and *Insufficiency*.] This pernicious Opinion is refuted by *Seneca* in his 1. B. of *Benefits*, Ch. 1. and B. 4. Ch. 16.

(r) *Kings and Princes*.] *Plutarch* in the beginning of *Pelopidas's* Life, depicts *weζον*, &c. 'Tis *Valour's* principal Business to preserve him who preserves all other things. *Cassiodorus* of *Friendship*, When the Hand, by the Assistance of the Eyes, discovers the Sword just leveling at any other Member, far from regarding her own Danger, but under greater Apprehensions for the other than her self, she fearless receives its Point. And afterwards, Those therefore who save the Lives of their Princes, tho' with the Loss of their own, do a very commendable Act, provided that they have more in view the Salvation of their own Souls, than the Preservation of another's Body; for since Conscience tells 'em, that they ought to express all Fidelity towards their Sovereigns, it seems no less Consistent to Reason, that they ought to prefer their Lord's Life to their own Temporal one. And then again, One of a Principle of Love therefore, and especially for the Preservation of many, a Man may very advantageously expose his Body to Death.

our own. So the same *Seneca*; *Callistratus* at *Rome*; and *Rutilius* at *Athens*, would never agree to have their *Estates* restored to 'em by the *Ruin* of the *Publick*, because it was much better for two to suffer a particular Injury, than that All should be involved in the general Mischief.

X. That
it is not
lawful for
Christians
to Murder
a Man for a
Box on the
Ear, or such
other slight
Injury, or to
avoid run-
ning away.

X. 1. There are some of Opinion, that if a Man's in danger of receiving a *Box on the Ear*, or any Injury of the like Nature, he has a right of revenging so small a Crime, even by the *Death* of him that attempts it. If regard be here only had to *Expletive Justice*, I don't deny it; for altho' there be no manner of proportion betwixt *Death*, and so slight an Injury; yet whoever shall attempt to wrong me, gives me from that Time a *Right*, that is, (f) a certain *Moral Power* against him for ever, upon a Supposition, that I am not otherwise capable of diverting such an Injury from my own Person. Neither does *Human Affection* itself seem to limit us here to any thing that may be in favour of the *Aggressor*; but the *Gospel* does expressly forbid this, for *Christ* commanded his *Apostles* rather to receive a *second Blow*, than to hurt their Adversary. How much more then does he forbid the killing of a Man for so trivial an Offence? By this Example we are admonished to beware of what *Covarruvias* advances on this Topic, that *Human Knowledge*, which is not ignorant of the *Right of Nature*, admits of nothing thro' *Natural Reason*, which God, who is Nature

(f) A certain Moral Power.] *Apollodorus* B. 2. speaking of *Linus*, ἀποκρίνας τὸν ἑῷ ὀφθαλμῷ, &c. When he was come to *Thebes*, and had the Freedom of that City, he died of a Blow with a *Harp* which he received from *Hercules*, who provoked at his striking him, killed him upon the Spot: Some People therefore charging him with the Murder, and demanding Justice against him, he appeal'd to, and produced a *Law* of *Rhadamanthus*, that declared him not Guilty, who should avenge himself upon him who offer'd the first Injury.

Nature it self, does any ways restrain. For God, who is so the *Author of Nature*, that he can freely act above Nature, has a *Right* also of prescribing Laws to us in those things which are in their own Nature free and indifferent. How much more then can he command us to do that which is naturally honest, tho' it be not strictly obliging?

2. It is therefore very surprizing, that when God has so manifestly declared his Will in the Gospel, we should find Divines, nay *Christian Divines*, who maintain, that 'tis not only lawful to kill a Man, in order to avoid so trivial an Injury; but to pursue him, in case he should endeavour to escape, to recover their Honour, as they call it; which to me seems as well contrary to Reason, as to Piety. For Honour being the Opinion of some Excellency or Merit, he that can put up such an Affront, expresses a particular Excellency of Temper; and therefore rather adds to his Honour, than detracts from it. Neither is it at all material, if some Men of corrupt Judgment shall revile this Virtue with an opprobrious Name, their Opinions being of no moment, either to alter the thing it self, or the Reputation it carries among Men of Sense; nor did the Primitive Christians only think so, but even the Philosophers, who said that it argu'd a meanness of Soul in a Man, not to be able to bear an Affront; as we have elsewhere observ'd.

3. From hence it appears too, that we ought not to approve what many People assert, that even by the Divine Law a Man in his own Defence may kill another. (Indeed if we consider the Law of Nature only, 'tis beyond all manner of Dispute) Nay, tho' at the same time he may escape from him without any Danger of his own Safety: Because, say they, to turn ones Back is Mean and Reproachful, and below the Dignity of a Gentleman: Where-

Whereas in Reality 'tis no ways a *Disgrace*, but only a false Nation, which all Men of Sense and Probity ought entirely to reject; in which Matter I am not a little pleas'd, that amongst Lawyers I have the Excellent *Charles Moline* of my Sentiments: Now what has been said of a *Box on the Ear*, or making ones *Escape*, may be equally apply'd to all other Cases, where Man's *True Honour* is not injur'd. But what if a Man shall report any thing of us, by which that *Reputation* we have with Good Men, may possibly suffer? There are those who assert, that a Man may lawfully kill such Persons too; but this is not only extremely *False*, but highly *Repugnant* to the *Laws of Nature*; for such an Action is no proper Means of preserving ones Character.

XI. Murder in defence of our Goods permitted by the Law of Nature.

XI. We now proceed to those *Injuries* that affect our *Estates* or *Possessions*; and here, if we have regard only to *Expletive Justice*, I must own, that for the *Preservation* of our Goods 'tis lawful, if there's a *Necessity* for it, to kill the *Thief*. For that apparent *Inequality*, that seems to be 'twixt the Goods of one Man, and the *Life* of another is made up, by the Difference 'twixt an *honest* Man and a notorious *Villain*, as was before observed; from whence it follows, that if we have regard only to what's *right*, I may shoot that Man who is making off with my Effects; if there's no other Method of my recovering 'em. So *Demosthenes* in his Oration against *Aristocrates*: Is it not, says he, highly unjust, and contrary to all Laws both *Divine* and *Human*, that I shall not be suffer'd to use Force against him that Robs me? Nor does *Charity*, by way of *Precept*, (if we consider it abstractedly from all *Human* and *Divine* Laws) disallow of this; unless in those things that are in themselves too *inconsiderable* to be regarded; which Exception some Authors do very justly subjoin.

XII. But

XII. 1. But let us see in what Sense the *Mosaic* Law is to be understood, to which agrees that old Law of *Solon*, which *Demosthenes* urges against *Timocrates*: From whence (1) the Law of the *Twelve Tables* was taken, and *Plato's* Institution in his 9th *de Leg.* all which consent in this, that they make a considerable distinction betwixt a *Night* and a *Day* Thief. What is the Design of this Law is doubtful. There are some who think it only regards this, that by *Night* it is not to be discover'd, whether the Person who comes in upon you, be a *Thief* or a *Murderer*, and therefore he ought to be treated as the latter; and others think that it turns upon this, that the *Thief* being not known, there is less probability of recovering one's Effects; but to me it seems, that these Lawyers had not any regard either to the one or the other of these Opinions, but rather intended that the *Life* of no Man was to be taken away merely on the account of one's Goods, which would certainly happen, if, for instance, I should shoot a *Thief* who is running away, to recover by his *Death* what he had stol'n from me: But that if I am any ways in *Danger* of my own *Life*, 'tis lawful then to secure my self, tho' it be at the other's Peril. Neither is it any Objection to me, that I brought my self into this Extremity, by endeavouring either to keep or recover my own, or to apprehend the *Thief*; for in all this there's nothing can be laid to my Charge, who am only concern'd in a lawful Act. Neither do I any Injustice to any Man, when I only make use of my own Right.

XII. How far permitted by the Law of Moses.

VOL. II.

C

2. The

(1) The Law of the Twelve Tables was taken.] To this may be added the Law of the *West-goths*, B. 7. Tit. 1. ch. 15. And the Statutes of *Charles the Great*, B. 5. ch. 191. in the *Lombard Law*, Whosoever enters another Man's Inclosure, and does not submit to Confinement, may be slain.

2. The difference therefore betwixt a *Night* and a *Day* Thief, consists in this, That in the former there cannot be sufficient Witnesses present, and therefore if the *Thief* should be found *Dead*, we easily give Credit to a Person who declares, that he *slew* him in his *own* Defence, especially if he had any *Weapon* with him that would hurt. For this the *Hebrew* Law requires where it treats of a Thief taken, בְּמִחוּרָא in the Act of *breaking up*, or *digging thro'*, or as some better Translate it, with a *stabbing Instrument*; in which Sense also the most learned of 'em have expounded that word in *Jer. ii.*

34. I am inclined the more in favour of this Opinion by the Law of the *Twelve Tables*, which forbids the *killing* of a *Thief* in the *Day-time*, unless he should have some *Weapon* in his Hand. It is therefore by this presum'd, that a *Night Thief* has *Arms* about him to defend himself with. Under the Name of *Arms*, or *Weapon*, an *Iron*, a *Club*, or a *Stone*, are included, as *Cajus* observes on this Law. On the contrary, 'tis the Opinion of *Ulpian*, that what is said of *killing a Nocturnal Thief* with Impunity, is to be understood of killing him, when we could not *secure* our Goods, and *spare* him, without running the *Hazard* of our *own* Lives.

3. This therefore is that Presumption which is allow'd in Favour of him who has *kill'd* a *Thief* by *Night*; but if Witnesses shou'd chance to be present, by whom *proof* cou'd be made, that the Person which thus *slew* the other, was far from being in *danger* of his *own* Life, then shou'd we presume no longer in his favour, but account him Guilty of Murder. It is, besides this, provided by the Law of the *twelve Tables*, that whoever shall *apprehend* a *Thief* either by *Day* or *Night*, shall signify it by an *Outcry*, (as we learn from *Cajus*) in order that the *Magistrates* or *Neighbours* may come into his Assistance, and be Witnesses of the Fact:

Fact: But because, as *Ulpian* observes, on the above-mention'd Passage of *Demosthenes*, this can't be so easily effected in the *Night*, therefore we give a greater Credit to the Person who asserts his Danger then.

4. Much like this is the *Jewish* Law in case of (u) a Rape, which if committed in the *Field*, and Complaint was made, the Woman's bare Word was Evidence sufficient; but if in the *City* the Case was otherwise, it being presum'd that she might and ought to have alarm'd the People. To this we may add, that tho' other Circumstances were equal, yet whatever is the Violence that is done by *Night*, it is worse than the same committed by *Day*, as it strikes on the *Mind* with greater Horror. The Law therefore, as well of the *Jews* as of the *Romans*, prescribes nothing to the People but what *Charity* enjoins, that *Robbery* should never be punished with *Death*, only in this last Case, where the Person by endeavouring to preserve his Effects, shall thereby endanger his own Safety. And as *Moses Maimonides* observes, no Man is permitted to destroy another, except in defence of that, which if once lost is irrevocable for ever, as Life and Chastity.

XIII. 1. What shall we then say of the Gospel in this Affair? Does it allow the same that the Law of *Moses* did? Or does it, as it is in other things more perfect than the *Mosaic* Law, exact more of our Obedience in this Respect also? In

XIII. Whether permitted at all, and how far by the Gospel.

C 2

my

(u) A Rape, which if committed in the Field.] Philo explains this Passage of the *Field* very well, as a Place expressly mention'd on the Account of the more frequent Instances of that Crime's being committed there; not that the Controversie is always to be determin'd from that Circumstance only. For it's possible, as he argues in his Book of *special Laws*, for one Woman to be ravish'd in a *City* by being Gagg'd, and another to consent to the Fact in a *Field*.

my Opinion, it is not to be question'd but that it does. For if *Christ* has commanded, rather to part with a *Cloak* or a *Garment*, than contend about it; and *St. Paul*, rather to suffer wrong, than to go to *Law* about it; tho' this be a Dispute where no *Blood* is shed; how much more shou'd even things of greater moment be given up, rather than a Man's *Life* should be taken from him, who's not only the *Image* of the *Creator*, but made even out of the same *Materials* as we our selves are? Wherefore if there's any possibility of preserving our Goods, without running the hazard of committing *Murder*, we may certainly do so; but if not, we shou'd rather be the *Losers*, unless it be of such things on which not only our own *Welfare*, but even that of our *Family* more immediately depends, and which by the *Methods* of *Justice*, can never be recover'd, because perhaps the *Thief* is not known, and we are in some hopes that the *Affair* may be concluded without any such *Bloodshed*.

2. And altho' to this Day, as well *Divines* as *Lawyers*, don't scruple to justify the killing of that Man, who attempts to *Rob* us; nay even out of those *Limits* in which the *Jewish* and *Roman* Laws did allow it; as for instance, if a *Thief* shou'd escape with our Effects; yet that the former was the Opinion of the *Primitive* Fathers, I think I have no reason to doubt. Neither did *St. Austin* question it when he said, *How can Men be guiltless in the sight of God, who even for things that a Christian ought to despise, shall embrue their Hands in Human Blood?* Indeed in this, as in other cases, (*) *Christianity* is fallen from its *Primitive Purity*, and the *Interpretation* of the *Gospel* is sensibly

(*) *Christianity is fallen from its Primitive Purity.*] *St. Jerome* in the *Life* of *Malchus*: *As soon as ever the Church began to have Christian Magistrates, she increas'd in Wealth, but decreas'd in Virtue.*

bly alter'd to favour the Customs of the present Age; and tho' amongst the Clergy, the ancient Discipline was in former Ages so strictly retain'd, yet even amongst these at present 'tis very little regarded, and all Censure upon this account absolutely laid aside.

XIV. 'Tis a Question with some Persons, whether the *Civil Law*, which is vested with a power of *Life and Death*, if in any case it shall allow that a *Thief* may be kill'd by a *private Person*, does not so far excuse the Fact, as to exempt it altogether from being a *Crime*. Which in my Opinion is scarce to be admitted of. For first, the *Law* has no *Power* over the *Life* of any Subject upon every Offence, but for Crimes only of so heinous a Nature as to deserve *Death*. And 'tis no ways unreasonable what *Scotus* advances, That no *Criminal* can be lawfully executed (y) but for those Crimes only that condemn him to dye by the *Law* of *Moses*, or for those that appear equal to these upon impartial Examination. Nor does it appear, that the *Knowledge* of the *Divine Will*, which alone can quiet the Conscience, can, in an Affair of so high a Consequence as this is, be otherwise had, than from this *Law* only, which certainly has no where Sentenc'd a *Thief* to *Death*. Besides, the *Law* neither does nor ought to give a *Power* to any Man to kill him privately who has deserv'd *Death*, unless in *Crimes* of the most flagrant Nature; for else 'twould be needless to have *Courts of Justice*. Therefore, when the *Law* acquits that Man who has kill'd a *Thief*, it may be understood to take off the *Punishment*, but not to give him any *Right* to the *Act* it self.

XIV. Whether the Civil Law permitting Murder in one's own Defence, gives a Right to the Fact, or only dispenses with the Punishment of it. Explain'd by a Distinction.

C 3

XV. From

(y) But for those Crimes only that condemn him to die by the Law of Moses.] Against the Laws which punish'd Peasants for Hunting, with *Death*, see *Gregory of Tours*, B. 10. ch. 10. *Johannes Salsberiensis*, Polieratic. B. 1. ch. 4. *Petrus Blesensis*, Epist. 119.

XV. When
a Duel or
single Com-
bat may be
Lawful.

XV. From what has been said it appears, that in two Cases we may justify a *Duel*; the first is, when the *Aggressor* shall oblige the other Person to be upon his *Guard*, by declaring he will kill him if he does not fight. The other, when a *King* or *Magistrate* shall doom two Malefactors, equally guilty of Death, to combat together: This Permission gives them an opportunity of entertaining hopes of Life: But he who gave the Commandment, does not so equitably discharge his Duty; since it were better, if he thought it sufficient for one only to suffer, that a Lot should determine the Choice.

XVI. Of
Defence in
a Publick
War.

XVI. What we have hitherto said, refers to that Right only which we have to defend our Persons and Estates, and more properly belongs to a *private War*, yet with some respect had to the difference of Things, (2) may be easily apply'd to a *publick* one; for in the first, the Right we have is, as it were, only momentary, and ceases when it comes into a *Court of Justice*. But for the latter, as it is not commenc'd, but where Judgment is not to be had, or has already determin'd, it is further extended, being continually fomented by some new Grievance or other. Besides, in a *private War* we have only a regard to our own Defence, but the Supreme Powers have not only a Right of *Self-defence*, but of *Revenge*ing those

(2) May be easily apply'd to a publick one.] Ammianus B. 23. Upon a Foreign Inroad there is but one Law, and that perpetual, by any Method whatever to defend one's Safety, the Force of any Custom against it notwithstanding. And the Emperor Alexander in his Speech to his Soldiers in Herodian, B. 5. χ το $\mu\upsilon$ $\alpha\rho\chi\epsilon\iota\upsilon$. &c. That Party which begins an Assault and Injury can have no fair Plea for the Injustice of so doing, but that which repulses such troublesome Aggressors receives Courage from a good Conscience, and an happy Assurance of Success results to 'em from the Reflection, that they are not engag'd in offending others, but in defending themselves.

those Wrongs that shall be done by others; From whence they may not only *justify* defending themselves from more *immediate* Dangers, but also from others that seem to *threaten* 'em at some considerable distance; not *directly* (for the Injustice of that we have shew'd already) but *indirectly*, by revenging what is already *begun*; of which we shall have occasion to treat in another place.

XVII. But I can hardly approve of what some People have advanc'd, that by the *Laws of Nations* we may *justify* a War to lessen the Exorbitant Growth of any rising Power, which if too much augmented, may possibly injure us. I grant, that in our *Councils of War* these things come frequently into Debate, not under the Notion of *Justice*, but under that of *Interest*. So that where we have any other *just* Cause for making War, it may for this Reason, too be *prudently* undertaken. And this is all that the Authors before cited do in effect say; but to pretend to have a Right to injure another merely out of a possibility that he may injure me, is repugnant to all the *Justice* in the World; for such is the condition of the present Life, that we can be no ways secure even of any thing we enjoy: Neither is our Safety to be repos'd in the confidence of our *Strength*; but in the *Prudence* of our own Measures, assisted by the Power of *Divine Providence*.

XVII.
War only to
weaken a
neighbour-
ing Power,
not Lawful.

XVIII. Nor is it more satisfactory what some others maintain, that we may engage in defence of those who have given occasions for a just War against themselves; because there are few who are content only to proportion their *Revenge* to the *Injuries* they receive. But such a suspicion of what's uncertain gives no Man a Right to take up Arms, no more than a Criminal can plead a Right of resisting the Power of a publick Magistrate who would

XVIII.
Nor in him
who himself
gave the
just occasion
for a War.

would apprehend him, on a pretence that his Punishments may be greater than his Crimes deserve.

2. But he who has offended another, ought first to offer him such a Satisfaction, as by the Judgment of any honest Man shall be thought sufficient; and if that be refus'd, his Arms for the future will be Just and Lawful. Thus Hezekiah

being threatned with a War by the King of Assyria, for not observing the League that his Ancestors had made, acknowledg'd his fault, and left it to that King to nominate what Recompence he should make him; which done, and being afterwards invaded with a powerful Army, he

then trusted to the Justice of his Cause, defended himself, and by the Assistance of the most high God, became Successful. So Pontius the Samnite,

having made a full Restitution to the Romans, for what had been unjustly taken from 'em, and deliver'd up him who was the Author of the War,

said, *We have now appeas'd that Vengeance of Heaven that the breach of our Leagues had drawn down upon us; and I am fully perswaded, that the same*

Gods who have compell'd us to make full Restitution of all Things, will also plague the Romans for so

haughtily despising the Satisfaction we offer for the Violation of the Treaty. And again, What more, ye Romans, do I owe to you, to your League, or

even to the Gods, who are the Arbiters of Leagues? Or to whom shall I appeal to as a Judge, as well of the Measures of your Rage, as of my Sufferings? I

refuse no one, neither People nor Person. So when the Thebans had offer'd to the Lacedaemonians all that they could in Justice require, and they were

yet for pushing matters further, (22) the Justice

(22) *The Justice of the War was quite alter'd.] Of the Prince of Chalep, who offer'd Argvopalus, the Roman General, Terms of Peace,*

Justice of the War was quite alter'd, and *Aristides* gave it in favour of the *Thebans*.

CHAP. II.

Of Things which belong in Common to all Men.

I. IT follows now, that in treating of those Causes that justify a War, we speak of *Injuries already done*, and which respect that which is properly ours: Now a thing becomes properly our own by the *Right* we have as being *Men*, or else as it particularly regards *our selves*. And first we shall treat of that which we have in *common* with all *Mankind*; and this is either directly over some *Corporeal* thing, or else refers to some peculiar *Actions*. Now *Corporeal* things are by *Nature* such, that they either admit of no *Propriety*, or else belong to some particular *Persons*. Now those things, in which there is already no *Propriety*, either are, or are not capable of being *impropriated*; for the better understanding of which, let us examine into the *Original* of *Property*, which our *Lawyers* do generally call *Dominion* or *Demesne*.

I. The Division of what is our own.

II. 1. Almighty God at the *Creation*, and again after the *Deluge*, gave to Mankind in general a *Dominion* over things of this *Inferior Order*. (a) *All things*, as *Justin* has it, were at first promiscuously

II. The Beginning and Improvement of Property.

Peace, and the *Tribute* in *Arrears*, see *Zonaras*. Something like this of the *Cruciferi* in *Cromerus*. B. 18. Of the *Switzers*, who offered *Charles Duke of Burgundy* Satisfaction for a Load of *Sheep-Skins* taken from the *Merchants*. see *Philip Comines*, B. 7.

(a) *All things were at first promiscuously common*.] Some Marks of which continued in the *Saturnalia*.

ously common, and all the World had, as it were, but one Patrimony. From hence it was, that every Man then converted what he would to his own use, and consumed whatever was to be consumed; and a free use of this Universal Right did at that time supply the place of Property, for no Man could justly demand of another, whatever he had thus first taken to himself; which is the better illustrated by that Simile of Cicero, (b) *Since the Theatre is common for any body that comes, the place that every one sits in is properly his own.* And this State of things must have continued till now, had Men but persisted in their primitive Simplicity, or lived together but in perfect Charity. A Confirmation (c) of the first of these is the Account we have of some People in America, who by the extraordinary Simplicity of their Manners, have without the least Inconvenience observed the same Method of Living for many Ages; and the latter appears by the Example of (d) the *Esseni*, of the Pa-

(b) *Since the Theatre is common.*] Seneca of Benefits, B. 7. Ch. 32. *The Equestrian Seats, belong indifferently to all the Roman Knights; but amongst them that Place which I am possessed of, is particularly mine.*

(c) *Of the first of these.*] Horace,

*Campestres melius Scythæ,
Quorum Plaustra, &c.*

*Happier the wandering Scythians live,
Who all their House in one small Waggon drive,
Where no unequal Bounds*

*Do Parcel out the Land in private Grounds,
The Corn grows freely for the Common Good;
And when one Year their Fields they've plow'd
They sit at ease, whilst others Toil
And equal Pains manure the Publick Soil.*

Cresch.

(d) *The Esseni.*] From these come the Pythagoreans. See Porphyry, Diogenes Laertius, Gellius 1. 9.

Primitive Christians at Jerusalem, and of some, who, even to this Day, lead an Ascetick Life. The Nakedness in which our (e) first Parents were made, was a sufficient Testimony of their Simplicity, who were rather ignorant of the Nature of Vice, than versed in the Knowledge of what was Virtuous, as *Trogus* testifies of the *Scythians*. The People of Antiquity, says *Tacitus*, (f) free from any vicious Inclinations, lived also free from Wickedness or Disgrace, and were consequently Strangers to Punishments or Restraint. So *Macrobius*, There was so much Simplicity amongst Mankind in the first Ages, that they were unacquainted either with Evil or Deceit. This Simplicity is what was by the wise Hebrew called (g) ἀφθαρσία, Incorruptibility, an inviolable Integrity, and ἀπλότης, Plain-Dealing, which he opposes τῇ πρᾶξι to Subtily, or a dextrous Turn to any thing. The Worship of God was then their only Care, of which (h) the Tree of Life was a Symbol,

(e) First Parents.] *Adam*, a Type of Human kind. See *Origen* against *Celsus*. A little pertinent to this is what *Terrullian* has said in his B. of the Soul, For what is Natural must certainly be believed to be Rational, as being what was Originally impressed on the Soul by the Author of Reason. For what is not Rational, that God has by any Command enjoined, much more so what he has peculiarly by his own Inspiration produced? But Irrational is to be understood of something later, as being accidentally derived from the Impulse of the Serpent, the very Act of Transgression it self, and from that Time has increased upon us, and is now grown up in the Soul as a sort of Nature, because it presently happened in the very beginning of Nature.

(f) Free from any vicious Inclinations.] *Seneca* speaking of the same People in his xth Epist. They were Innocent thro' Ignorance. And then talking of Justice, Prudence, Temperance and Fortitude, he adds, That Rude Life had something that resembled these Virtues. And *Josephus* ἡνδραϊκά ἐρεῖς ὁμοίους ψυχῇν θεοῦ ἰδίᾳ, not distracted in their Soul with Care.

(g) Αφθαρσία.] So also *St. Paul*, *Ephes. vi. 24.* who has likewise called it ἀκαταρσία, Uncorruptedness. *Tit. ii. 7.*

(h) The Tree of Life was a Symbol.] By the Rabbins, Superior Holiness; by *Arethas* on the Apocalypse ἐνδεσσοφία, Divine Wisdom;
Of

bol, as the Ancient Jews explain it, and as is indeed conformable to the *Apocalypse*, contenting themselves with what the (i) Earth untill'd did naturally afford 'em.

2. But Men did not long continue in this *Pure and Innocent State of Being*, but applied themselves to various Arts; and to the Understanding of those things which they might convert to a *Good or Evil* purpose (as was meant by (k) the *Tree of Knowledge of Good and Evil*) which *Philo* calls *μεσσηία* a middle or ambiguous *Prudence*, to which *Solomon* must have regard when he said, that *God made Man upright*; but that they had sought out many *Inventions* ἐβρέπον αἰς πωροσύνην, grew strongly inclined to *Fraud and Trickery*, as *Philo* on that Passage expresses himself. So *Dion Pruseensis* in his 6th Oration, ἀλλὰ τὴν πα-

Of *Paradise*, see *Ecclesiastic*. Ch. xl. 17. and of its four Rivers, xxiv. 25, &c.

(i) What the Earth untill'd did naturally afford them.] See an eminent Passage on this Subject, B. 11. of *Varro de Re Rustica*, out of *Dicaarchus*; and compare with it what *Porphyry* has out of the same *Dicaarchus* in his 4th B. *de non esu Animalium*.

(k) The Tree of Knowledge of Good and Evil.] *Josephus*, τὸ οὐτὸν δέξυται, &c. The Tree of Sharpness and Understanding. *Telemachus* in *Homer*.

Καὶ οἶδα ἕκαστα

Ἐδὼλ' τε καὶ τὰ χεῖρα πάρος δέ τε νῆπι' ἦν.

Now every thing I know, what's Good, what's Bad,
Before, I Ignorant was.

By *Zeno Cittiensis* *Prudence* is termed the Knowledge of Things Good and Bad and Indifferent. You have it in *Diogenes Laertius*. *Plutarch* of Common Notions, τί δεινὸν εἰ τῶν κακῶν, &c. where would the Inconvenience be, if there were no *Prudence* as all provided that what's Evil was removed and gone; for we might have another Virtue in the room of that, the Knowledge not of Good and Evil, but of Good alone.

vspeyav, &c. But that Cunning and (l) that various Sagacity and Contrivance was to those who came after but of very little Service in the Nobler Designs of Life. For these Men did not use their Wisdom to the Purposes of Valour and Justice, but to those of Softness and Pleasure. The Ancient Arts of Agriculture, and of feeding Cattle, appeared early with the two first Brothers; but that not without some sort of Division in the Produce of each; from this difference of Humours and Employment arose Envy, and then Murder: And, at last, when the good Men were corrupted by Conversing with bad, prevailed (m) a sort of Gigantic Life, that is a Life of Violence, such as was that of those People whom the Greeks term'd *χερσόντας*, Men who own'd no other Justice but that which their own Strength and Hands allow'd them. (n) The World by the Deluge purged from these Corruptions, to this Wild Life succeeded a Passion for Pleasure, (o) which heightened by the freer use of Wine, produced unlawful Familiarities.

3. But what particularly set them at Variance was, that more noble and generous Vice *Ambition*, of which the Tower of *Babel* was an exalted Instance; from that time they were divided, some taking up their

(l) That various Sagacity and Contrivance.] Seneca in his xth Epistle handles this matter very largely. Consult him and *Dicaearchus* in the above-mentioned Writers.

(m) A sort of Gigantic Life.] Seneca in his 3d B. of *Natural Questions* at the End. And the Beasts too, into whose Tempers and Inclinations Men had degenerated, being drown'd and gone.

(n) The World by the Deluge purged from these Corruptions, to this wild Life succeeded a Passion for Pleasure.] Seneca in the last cited place, but neither shall these retain their Innocence any longer than they are fresh and new.

(o) Which heightened by the freer use of Wine, produced unlawful Familiarities.] The great Reward of Drunkenness, monstrous Lust, and pleasant Wickedness. Seneca ditto.

their Residence in one part of the Earth, and some in another. But even after this, not only *Cattle*, but even *Lands*, were yet in common amongst Neighbours; for the number of People was yet so inconsiderable, in comparison to those vast Tracts of Land, that every one might convert what he would to his own use, without any Detriment and Inconvenience to the rest.

*No Fences parted Fields; nor Marks nor Bounds
Distinguish'd Acres of Litigious Grounds:
But All was Common.*

Dryden's Virg. Georg. I.

But the number, not only of Men, but of Cattle encreasing, they divided themselves yet further, not into *Nations* as before, but into *Families*. And because *Water*, a very necessary Article in a dry and sultry Country, was scarce, and insufficient to supply a Multitude, every one who got (p) first Possession of a Spring, secured it for his own. This is what we learn from the *Sacred History*, and is agreeable to what both *Poets* and *Philosophers* have spoken of that *early State* of things, when All was *Common*, and of the *Divisions* that followed. The Testimonies of these Authors I have had occasion to produce in other Places.

4. From hence we learn, upon what Account Men first departed from the common Use, of not only *moveable* but *immoveable* things; for being unsatisfied with (q) what *Nature* supplied, they were no longer for dwelling in *Caves*, for going *Naked*,

(p) *First Possession of a Spring.*] Of Springs at *Oasis* in common to many, see *Olympiodorus* in *Photius*.

(q) *What Nature supplied.*] Such a Primitive Life among the *Scythians*. *Procopius* accurately describes in his 2d *Gothic*. To whom add *Pliny* 12. 1. *Vitruvius*, B. 2. Ch. 1.

Naked, or covering themselves with the *Barks* of *Trees*, or the *Skins* of wild *Beasts*; but made choice of a more *delicate* sort of *Life*, in which there was a *Necessity* of using some *Industry*, which each might apply to his particular purpose. And now the *Fruits* of the *Earth* could not, as before, be used in *Common*, by the reason of the *Distance* of their *Habitations*, and then a general *Defect* both of *Love* and *Justice* amongst *Men* ensuing, there was no *Equality* observed, either as to their *Labour* in *acquiring*, or their *Frugality* in *consuming* what they had.

5. Thus we see what was the *Original* of *Property*, which was derived not from a mere *Liberty* of *Choice*, for no one, he not knowing what another would chuse, could be sure of not chusing the same; nay, 'twas very possible, that several might desire one and the same thing; but it resulted from a certain *Compact* and *Agreement*, either expressly by a *Division*, or else tacitly (r) by *Seizure* and *Possession*. For 'tis natural to suppose, that as soon as ever *living in common* was thought *Inconvenient* and *Disagreeable*, before any *Partition* could be made, (s) 'twas *Universally* agreed, that what e-
very

(r) *By Seizure and Possession.*] See what *Selden*, the Honour of the *British Nation*, furnishes us with, on this Subject, out of the *Gemara* and the *Alcoran*, in his *Sovereignty of the Seas*.

(s) 'Twas *Universally* agreed, that what every *Man* actually possessed should be properly his own.] *Cicero*, Since at present, by some of these ways, each particular *Man* has his *Personal Possessions*, out of that which by *Nature* was common to *All*, 'tis but *Reason* that each should hold what is now his own. Which he illustrates with *Chrysippus's* Simile of a *Race*, where every one's at *Liberty* to get the better of his *Antagonist* by out running him if he can, but he must not trip up his *Heels*, or thrust him aside with his *Hands*. And the *Scholiast* upon *Horace's Art of Poetry*, *As an House, or a Field without an Owner is common; but when any one owns it, 'tis then his Property alone.* *Purro* in his *Treatise*, Intituled, *Age Modo*: The *Earth* was formerly,

very Man actually possessed should be properly his own. (1) 'Tis no more, saith Cicero, than what Nature will allow of; that each Man should look after himself in the first place, and furnish himself with the Necessaries of Life, before he takes care to provide for other People: To which we may also add that of Quintilian, If this be the present State of Affairs, that Possession alone can give us a Property in whatever is useful to Mankind, then whatever we are thus possessed of can never be justly taken from us: So when the Ancients stiled Ceres a *Legislator*, and her Mysteries *Thesmophoria*, they intimated, that by (u) the Division of Lands every Man acquired a sort of new Right.

III. Some things can never become a Property, as the Sea either taken in whole, or in regard to its Principal Parts, and the Reason why.

III. 1. This being premis'd, we affirm that none can have any Property in the Sea, whether taken in the whole, or else in respect to its Principal Branches; and because some People are willing to allow, that it cannot be possessed by Particular Persons, but that it may be by States and Nations, we will prove the contrary, first from a Moral Reason; the Cause which obliged Mankind to desist from

that it might be Improved and Cultivated, delivered out in Slips and Parcels. as *Hetruria* to the *Tuscans*, *Samnium* to the *Sabelli*.

(1) 'Tis no more than what Nature will allow of, that each Man should look after himself in the first Place.] Solon,

Χρήματα δ' ἰμεῖρα μὴ ἔχεν, ἀδίκως δ' ἐπετάατο
Οὐκ ἐδέλω.

Riches indeed I'd have; but ne'er shall wish
Dishonestly to get 'em.

Cicero in his 1. B. of Offices, Not that the bettering of one's Circumstances, where no one else is prejudiced, is at all to be blamed; but an Injustice is for ever to be avoided.

(u) By the Division of Lands every Man acquired a sort of new Right.] When from the Distinction of Lands, Rights and Laws arose. So *Servius* upon *Legifera Cereri* in the 4th *Eneid*.

from the use of things in *Common*, having nothing at all to do in this Affair: For the *Sea* is of so vast a bigness, as to be sufficient to supply the Necessities of all Mankind, either with *Water*, *Fish* or *Navigation*. The same might be alledged of the *Air* too, could we put it to any Use Independant of the *Earth*; but this can't be, for we find it necessary even in (x) *Fowling*, and which is therefore under the Direction and Government of him who is the Owner of the *Land* where the *Birds* are caught.

2. The same may be asserted of Shelves and Quick-Sands, which are incapable of Improvement; but in such prodigious Quantities, that they can never, by the *only use* they are capable of, that of *fetching Sand* from them, be ever possibly exhausted. There is also a *Natural Reason* which forbids, that the *Sea*, thus considered, should be any body's Right, because there's (y) nothing can be *possessed*, which in it self is *Boundless*. So *Thucydides* called the Land that was *uninhabited ἀόριστον*, *unbounded*; and *Isocrates* the Land which the *Athenians* were possess'd of, τὴν ὑπ' ἡμῶν ἀπορριπτεῖσθαι, *limited and bounded by us*; but *Liquids*, because not contained within themselves (τὸ ὑπερὶν ἀόριστον οἰκείῳ ὅρῳ, *a Fluid is unconfin'd by its own Bounds*, says *Aristotle*) can never be possessed, unless as they are inclosed by something else, as *Lakes* and *Ponds*; and also *Rivers* are subject to Property, because confin'd within their Banks. But the *Sea* can never be

VOL. II.

D

bounded

(x) In *Fowling*.] And the Right of Habitation too. *We must Measure Bottom and Top, Earth and Air*, says *Pomponius*. B. Si opus, D. quod vi aut clam. And to the same Purpose the last Law but one, D. pro Socio.

(y) Nothing can be possessed, which in it self is *Boundless*.] Therefore *Horace* calls the Lands which have no particular Owner, *Fugera Immetata*, *unbounded Acres*.

bounded by the *Earth*, as being equal to it, if not (z) greater, as the Ancients believed, and therefore affirmed, that the *Earth* was contained in it; ἡ ὠκεανὸν δεσμεῖ ἔνθεν &c. *The Ocean encompasses the Earth, and as a Band girds and ties it in*, are the Words of *Apollonius* in *Philostratus*. And as *Sulpitius Apollinaris* says in *Gellius*, *What can be said to be without the Ocean, when the Sea does on all sides environ the Earth?* And again, *Since then on all sides it flows round the body of the Earth, nothing can be said to circumscribe it; but every Land being thus intrenched with the Circuit of its Waters, all things which are shut up within its Borders are in the midst of it.* So *M. Acilius* the Consul, in his Harangue to the Soldiers in *Livy*, *The Ocean*, says he, *which incircles and confines the Globe.* So in *Seneca's* *Advices* the Ocean is styl'd the *World's Ligament*, and the *Earth's Great Bastion*: So by *Lucan*, *unda mundum coercens, a Water that confines the World.* Nor must we ever fancy the *Sea* could be parcelled out: For when the Lands were thus divided, the *Ocean*, at least the major part of it, was undiscovered; and therefore 'tis not in the least reasonable to believe, that People so distant from each other should agree about any such Partition.

3. Wherefore those things that remained undivided after the first Partition, when all Mankind had a Right in common, can never now become a Property by Division, but only by Possession; nor can things be divided, unless those who divide 'em have a Property in 'em.

IV. We now proceed to those Things which may become a Property, but are not so yet. Of this

IV. Lands not inhabited are his who takes Possession of them, unless a whole Nation lay claim to 'em by the same Right of Possession.

(z) Greater.] So *Jarchas* thought of the Ocean in *Philostratus* 3, II.

this kind are many (*a*) unmanured Places, (*b*) *Islands*, wild *Beasts*, *Birds* and *Fish*. But here are two things to be remarked, that there is a *double Right of Possession*, the one *Universal*, and the other *Particular*; the former is usually done by the whole *People*; or by him who is their *Governor*, for a *Publick Advantage*; the latter by private and particular Persons, but this is a *Tenure* rather assign'd to them, than taken and held by them by their own *Will and Choice*. But in case there be any thing left that is not in the immediate Possession of any, it cannot be therefore accounted *waste*, for it is yet in the *Jurisdiction* of the first Possessor, whether *King* or *People*; such as your *Rivers*, *Lakes*, *Ponds*, *Woods*, and uncultivated *Mountains*.

V. As to wild *Beasts*, *Fish* and *Birds*, we must observe too, that whoever has *Dominion* over the *Lands* or *Waters* in which they are, may lawfully prohibit any Person from either taking, or conveying 'em away; and the same is *Obligatory* on *Foreigners*. The Reason of which is this, that it is *Morally necessary* for the *Government* of a *State*, that whoever shall join with it, by entering its *Territories*, tho' it be but for a time, should be for that time conformable to the *Customs* and *Constitution* of the *Place*. Neither is it any *Argument* to the contrary, what we often read in the *Roman Law*, that every Man has by the *Law of Nature* and *Nations*, a *Privilege* to hunt such sort of *Creatures*; which is only true, when there is no *Civil Law* in being to forbid it: For by the *Laws of Rome*, in that early Age, there were many things left *Arbitrary*, which were pro-

D 2

hibited

V. Wild
Beasts, Fish
and Birds
are his who
catches 'em,
unless there
be a Law to
the con-
trary.

(*a*) *Unmanur'd Places*.] See *Bembo's History*, B. 4.

(*b*) *Islands*.] As the *Echinades* which *Alcmaon* by Possession made his own. *Thucyd.* at the End of B. 2.

hibited by the *Laws* of other Nations. But when any thing is decreed by the *Civil Law*, we are commanded even by the *Law of Nature* to observe it. For tho' the *Civil Law* can enforce nothing which the *Law of Nature* does any ways prohibit, nor forbid any thing which that enjoyns; yet notwithstanding may it limit and *circumscribe* this natural Freedom, and forbid those things which are naturally lawful; and consequently, by its own Authority, may prevent and hinder that *Property* and *Dominion* which might otherwise be *naturally* obtained.

VI. In case
of Necessity
Men have a
Right of u-
sing that
which others
have a Pro-
perty in,
and from
whence this
Right arises.

VI. 1. Let us now see whether Men may not have a Right to enjoy in *common* those things that are already become the Properties of other Persons; which Question will at first seem strange, since *Property* seems to have swallowed up that Right which one Man may lay claim to in *common* with the Rest. But this is a Mistake; for we must examine into the Designs and Intentions of those who first introduced these particular *Properties*, which we may imagine to be such as deviated the least from *Natural Justice*. For if even *written Laws* are always to be explained in that Sense which comes nearest to common *Equity*, much more *Customs* then which are unconfined, and not at all chained down to the Letter of a Law.

2. From whence it follows first, that in a case of Absolute Necessity, that former Right of using Things as if they still remained common, must revive, and be in full Force: For in all Laws of Human Institution, and consequently in that of *Property* too, allowances are made for Matters of strict Necessity.

3. Hence it is, that at Sea, when there is a scarcity of *Provisions*, what any Man has reserved in store, is distributed in common among the Rest: So in cases of *Fire*, I may pull down my Neigh

Neighbour's House, if I have no other means of preserving my own; or if another Ship should run foul upon mine, I may cut her Cables and Rigging to secure my self, if there's (c) no possibility of being otherwise disengag'd; all which, tho' they were no ways stipulated, are easily deducible from the Civil Law.

4. For it is even amongst Divines a receiv'd Opinion, that whoever shall take from another what is absolutely necessary for the immediate preservation of his own Life, is not from thence to be accounted guilty of Theft: Not only on account, as some alledge, that the Person who is then in Possession of such things, should out of meer Charity be obliged to supply him; but even that in the Original of Government it self, there were some kind Exceptions in cases of the like Nature. For if they who were first concern'd in that division of things which we now see, could be ask'd their Opinions in this matter, they would answer the same as we assert. *Necessity*, says *Seneca* the Father, *that great Patroness of Human Frailty*, (d) *breaks thro' the Ties of all Human*
D 3 Laws.

(c) *No Possibility of being otherwise disengag'd.*] Such Proceedings as these are not allowed, but upon a great and sufficiently necessary occasion. *Ulpian* in his *B. Si Alius*. § 4. *D. quod vi aut clam*. Where follows that Example of pulling down Houses to stop the Progress of a Fire.

(d) *Breaks thro' the Ties of all Human Laws.*] It defends whatever it has compell'd us to do, *B. 4. Contr. 27*. This *Seneca* illustrates by several instances in his *Collections* *Contr. 4*. 'Tis *Necessity* that lightens the Ship by throwing it's Cargo over-board. 'Tis *Necessity* that puts out a Fire by pulling down the Houses. *Necessity* is the Law of Time. And *Theodorus Priscianus*, an old Physician: 'Tis often absolutely proper for breeding Women, when in Danger of their Lives, to purchase a certain Cure and Recovery by the Loss of the Child they go with, as a cutting off of the growing Branches is with Advantage apply'd to Trees; and as Ships laden deep, when a strong Tempest lies on 'em, in their Damage only find Relief. Those first words re-
late

Laws. So *Cicero*, *Cassius* pass'd over into *Syria*, another's Province, if Men would regard written Laws; but these suppress'd, into a Province now his own by the Law of Nature. So *Curtius* says, that in a common Calamity every Man must be as careful as he can of his own Safety, and provide for himself.

VII. This holds good, unless where the Necessity is avoidable some other way.

VII. But here some Precautions are to be regarded, least this Liberty should go too far. And first, that all possible means should be us'd, by which such a Necessity may be avoided; either, for Instance, by applying to a Magistrate to see how far he would relieve us, or by entreating the Owner to supply us with what we stand in need of. *Plato* did not permit one Man to draw out of another's Well, 'till he had digg'd so far in his own Ground, that there was no longer any hopes or expectation of Water. And *Solon* requir'd, that a Man should first dig in his own Spring forty Cubits; where *Plutarch* adds, ἀπορία γ' &c. He thought it convenient to assist Mens Necessities, but not to indulge their Sloth. And *Xenophon* in his Answer to the *Sinopenses*, οἱ ποὶ δ' αὖ ἐλθόντες ἀγοράν, &c. Where-ever we come, and have not the freedom of a Market, whether in a Barbarian or a Grecian Country, we take what we have occasion for, not out of Insolence, but Necessity.

VIII. Or unless the Owners Necessity is equal to ours.

VIII. But secondly, this is no ways to be allow'd, if the right Owner be press'd by the like Necessity; for in such a case the condition of the latter is to be preferr'd. He is no Fool, says *Lactantius*, who tho' it be for the preservation of his Own Life, will not rob the Shipwreck'd Wretch of his Plank,

late to the ἐμβρυοβλάτης, (a Hook that Surgeons and Midwives use to draw out the dead Fetus) a Description of this Instrument you have in *Galenus* and *Celsus*; and therefore this Term ought to be restor'd in *Tertullian de Anima*.

Plank, nor throw down the wounded from his Horse; because he thus abstains from doing an Injury which is a Sin, and to avoid this Sin is Wisdom. But what? said Cicero, if a wise Man be ready to perish with Hunger, must not he take away Victuals from another, tho' a perfectly useless and insignificant Fellow? No, by no means; for Life it self is not so dear to me, as a settled Resolution of doing no Wrong for my own private Advantage. And we read in Curtius, He who will not part with his own, has more Justice on his side, than he who demands what's another's.

IX. *Thirdly, when my Necessities shall compel me to take any thing from another Person, I certainly ought to make that Man Restitution, if my Circumstances will ever allow me to do it. There are some tho' of a contrary Opinion, and argue thus, that whoever makes use of his own Right only, is not obliged to Restitution: Whereas the Truth of it is, this Right is not absolute, but limited to this, that Restitution shall be made when that Necessity's over. For such a Right is only for the Preservation of natural Equity, against the Rigour and Severity of Property and Dominion.*

IX. *An Obligation to Restitution, where it can be made.*

X. *Hence we may infer, how far he that is engaged in a just War may possess himself of any Fort in a Neutral Country, provided that there be not an imaginary, but a certain Danger of the Enemies getting it into his Hands, and of his being thereby capable of doing irreparable Injuries; and provided too, that he takes nothing but what is immediately for his Security; for instance, the bare Garrison of the Place, giving up at the same time not only the Jurisdiction, but the Revenue to the lawful Owner. And lastly, that this be done with an intention of restoring even the Garrison it self, as soon as ever the Danger is over. Enna, says Livy, is detain'd either by Injustice or*

X. *An Instance of this Right in War.*

Necessity; because whatsoever does but deviate the least from *Necessity*, is *Injustice*. The *Grecians* who were with *Xenophon*, when they had the most pressing occasion for *Shipping*, by *Xenophon's* Advice, seized such as pass'd by; but so, that the *Lading* was preserv'd untouch'd for the Owners, and to the Seamen they not only gave Provisions, but pay'd 'em for their Trouble. The first Right therefore that from Ancient Community can any ways be pleaded, since *Property* was introduc'd, is this of *Necessity*.

XI. Men have a Right to use those things which are another's Property, if thereby there arises no Detriment to the Proprietor. Sympof. 7.

XI. The next is that of *Innocent Profit*; when I only seek my own Advantage, without damaging any body else. Why should we not, says *Cicero*, when we can do it without any Detriment to our selves, let others share in those things that may be Beneficial to them who receive 'em, and no Inconvenience to us who give 'em. *Seneca* therefore denies, that 'tis any Favour to light a Fire by another Man's. And we read in *Plutarch*, *ἐπεὶ οὐδ' ἔστιν ἄνθρωπος ἀνὴρ ὅστις ἴδῃ καὶ ἴσῃ τὰ κοινὰ* &c. 'Tis an impious thing for those who have had sufficient, to throw away the remaining *Vittuals*; or for those who have had *Water* enough to stop up and hide the *Spring*; or for those who themselves have had the Advantage of 'em, to destroy the *Sea* and *Land Marks*; but we ought to leave 'em for the Use and Service of them, who, after us, shall want 'em.

XII. From hence is there a Right to running Water.

XII. So a *River*, consider'd meerly as such, is the Property of the People thro' whose Lands it flows, or of Him under whose Jurisdiction that People is; and they may, if they please, damm it up, and whatever that River produces is theirs. But if this River be consider'd as a running Stream, it is so far common, that any body may drink or draw thereof.

Who

*Who can forbid from Light to kindle Light?
And who'd, for th' Ocean, Waters keep in store?*

says Ovid; who also brings in *Latona* thus speaking to the *Lycians*,

*Why do you refuse me Water? Water is
The common Right of all.*

Where also he calls *Water* a publick Gift, that is, a Gift common to all Mankind; the word *publick* being improperly us'd; in which Sense some things are by the Law of Nations said to be *publick*. So *Virgil* asserted *Water* to be *cunctis patentem*, open to all Men.

XIII. 1. So likewise a free *Passage* ought to be granted to Persons, where just occasion shall require, over any Lands and Rivers, or such parts of the Sea as shall be then in the Property and Possession of any other Nation: As for instance, if being expell'd their own Country, they seek some waste Lands for a Habitation, or if they desire to settle a Commerce with some distant People, or even to recover by a just War what's their own Right and Due. The Reason is the same with that above, that those who laid the first foundation of *Property*, introduc'd it with this Clause and Limitation, that where a Man can do any thing (e) to his own Advantage, without Detriment to another Person, he may then act as if all things had still remain'd in *common*.

XIII.
The Right
of passing
Lands and
Rivers. ex-
plain'd.

2. A

(e) To his own Advantage, without Detriment to another Person.] *Servius* upon the 7th *Æneid*, We ask an inoffensive Shore; the Possession of which, says he, can injure no Body.

2. A remarkable Instance we have of this in the History of *Moses*, who being to march thro' another People's Country, offer'd first to the *Edomite*, and then to the *Amorite*, these Conditions, that for his part he wou'd pass thro' the *King's High-way*, neither wou'd he trespass on any Man's private Possessions, and if he shou'd have occasion for any thing that was theirs, he wou'd pay 'em the full Value of it; which being rejected, was a sufficient Reason for that (f) Just War he made on the *Amorites*. They refus'd him, says *St. Austin*, a Passage which could not do 'em any Prejudice; a Passage, that by the most equitable Law of human Society, ought to have been granted him.

3. Thus too the *Greeks* under *Clearchus*, *τοπευόμεθα* ὃ &c. We are going home, if no body obstructs and molests us; and by the assistance of the Gods will we endeavour to defend our selves and our Passage against any who shall injure us. Not much unlike this was (g) *Agefilaus's* Question, who returning out of *Asia*, and being come to *Troas*, ask'd 'em, whether they would permit him to pass as an *Enemy*, or a *Friend*. So (h) *Lyfander* to the *Bœotians*, whether they were willing that he should march thro' 'em in an amicable or an hostile manner. And the *Hollanders* in *Tacitus* declare to the *Bulloignese*, If no one oppose us we'll go peaceably along; but if Resistance is made, we'll cut out our Passage

(f) *Just War.*] *St. Austin* in the place here quoted, says, That the Children of *Israel* engag'd in a Just War against the *Amorites*. So, as *Apollodorus* observes, *Hercules* slew *Amyntor* King of *Orchomenus*, for denying him Passage. The *Grecians* made War upon *Telephus*, because he would not suffer 'em to go thro' his Territories. This is taken Notice of by the *Scholiast* on *Horace's* Epode against *Cani-dia*. To these add the *Lombard Law*, B. 11. Tit. 54. c. 2.

(g) *Agefilaus's Question.*] Of this Affair see *Plutarch* in his Life.

(h) *So Lyfander.*] The same Author in his Life too.

Passage with our Swords. So *Cimon*, (when, going thro' the Territories of *Corinth* with Supplies that he was to carry to the *Lacedemonians*, he was reproved by the *Corinthians*, that he had not ask'd the Consent of the City; for he who knocks at another Man's Door, said they, does not enter but by the Master of the House's leave) made 'em this Reply, *But you have not knock'd at the Cleonians and Megarense Doors, but have broken 'em down, thinking that all ought to lie open to the strongest.* The middle Opinion then is the best, that (i) the Liberty of passing ought first to be demanded, and if that be deny'd, it may be claim'd by Force. So (k) *Agefilaus*, when in his Return from *Asia* he desir'd of the *Macedonian King* leave to pass thro' his Dominions, and that Prince told him he would consider of it, answer'd briskly, *Yes, let him consider of it, and in the mean time we will pass through.*

4. Nei-

(i) *The Liberty of passing ought first to be demanded*] *Aristophanes*, in his *Avisus*:

Ἐἰδ' ὥσπερ ἡμεῖς ἦν ἵεναι βαλόμεθα
Πυθῶδε βοιωτὸς δίοδον αἰσέμεθα.

*As we, when to Apollo we desire to go,
Ask the Boeotians leave to pass.*

where the Scholiast. τότε μόνον δίοδον, &c. They then only require a Passage, when they have an Army to lead over. The *Venetians* suffer'd both the *Germans* and the *French* to pass thro' their Country when they were contending for *Maranus*, *Pāruta* &c. When the *Germans* complain'd of their giving Passage to their Enemies, they shew'd 'em, that they could not have hinder'd 'em but by the Force of Arms, which 'twas not their Custom to make use of but against their own profess'd Enemies, in the same Book. And so the Pope too excuses himself, in the 12th Book of that Author.

(k) *Agefilaus*, when in his return from *Asia*] Look into *Plutarch* about this matter also, in his *Life of Agefilaus*.

4. Neither can it be reasonably objected, that there may be just Suspicions of some Danger from the passing of a Multitude; for one Man's Right is not diminished by another Man's Fear; and much less so because there are Methods of Security provided against it; as that they may be divided into small Bodies, or (l) be oblig'd to pass unarm'd, as the Inhabitants of *Cologne* represented to the *Germans*; which Custom, as *Strabo* remarks, was formerly observ'd amongst the *Ælians*; or he that permits another to pass thro' his Dominions, may guard himself by what Force he shall think sufficient, which Force shall be maintain'd at the Expence of him who demands this Passage; or (m) Hostages shall be given, as *Seleucus* requir'd of *Demetrius*, on condition that he let him continue in his Dominions. Nor is a Fear of provoking that Prince, against whom he that thus passes is engag'd in a Just War, a sufficient Reason for refusing him a Passage. Nor is it any more an Excuse, that he may pass some other way; for this is what every Body may equally alledge, and so this Right of passing would be intirely destroy'd: But 'tis enough that the Passage be requested, without any Fraud or ill Design, by the nearest and most convenient way. If indeed he who desires thus to pass, undertake an unjust War,

or

(l) *Be oblig'd to pass unarm'd.*] You have an Example of this kind *Exc. Legat. 12*, in the 7th Book of *Bemba's Italian History*. See too some notable Articles of Passage, between *Frederick Barbarossa*, and *Isacius Angelus*, in several places of *Nicas's 2d Book* of the Life of that *Isacius*. In the *German Empire*, whoever begs the Liberty of a Pass, stipulates to repair all Damages. See *Crantzjusz Saxonicorum*, B. 11. and *Mendoza in Belgicis*. *Cæsar* would not let the *Switzers* go thro' the Province, for he thought that Men of such bad Principles would not keep from Injuries and Mischief. In his 1st Book *de Bello Gallico*.

(m) *Hostages shall be given.*] You have an Instance in *Procopius's 2d Book Persicorum*.

or (n) if he brings my Enemies along with him, I may deny him a Passage; for in this case I have a Right to meet and oppose him, even in his own Land, and to intercept his Journey.

5. Neither is this Liberty of passing due to *Persons* only, but also to *Goods* and *Merchandize*; for no Body has a Right to prohibit that Commerce, that one Nation shall think fit to establish'd with another distant Nation; it being for the Interest of Society in general, and no way detrimental to particular Persons; for if any one be disappointed of a Profit which he only expected but had no Title to, this ought not to be reputed an Injury. To the Testimonies we have already produced to this purpose, we shall subjoin one (o) out of *Philo*, *ῥῶσα ἢ δάλατα* &c. *Merchant-Men and Ships of Burden do safely Sail on ev'ry Sea, to exercise (p) that Commerce, which Nations,*
out

(n) *If he brings my Enemies along with him.*] This the Franks who were in Venice said to Narses, who was bringing the Lombards along with him, Gothic. B. 4. Other Examples of a Pass deny'd to People, you meet with in Bembo's 7th Book, *Italiconum*; in *Paruta's Venetian History*, B. 5, and 6.

(o) *Out of Philo.*] In his Embassy to Caius.

(p) *That Commerce, which Nations, out of a desire of partaking of each others Goods and Manufactures, have establish'd together.*] In *Florus*, B. 3. *If you take away Trading, you break the Engagement that unites Mankind.* *Servius* on the 4th Eclogue, *Navigation owes its Rise to Trade.* And on the 1st Georgic, *He signifies, that Men out of the Necessity of procuring what they wanted, found out the Art and Study of Navigation.* *A free and open Trade by Sea was a common Good.* *Ambrosius*, in his Works of the Creation, *The good Sea a kind Entertainment for Rivers, a Carriage for Provisions, by which distant Nations are to each other join'd.* This is taken out of *Basil's Hexameron* B. 4. *Theodoret* in his 2d Book of Providence very elegantly styles the Sea the Market of the World, and the Islands, its Stands. To these I'll subjoin *St. Chrysostom's* Words to *Stoicheius*, *τί ἂν τις ἐποιτὶ τὴν πρὸς τὰς ἐπιμαχίας* &c. *Who can express the easiness we enjoy of Trade and Commerce? For, lest the length of the Journey might divert and discourage us from a friendly Correspondence, God*
has

out of a desire of partaking of each others Goods and Manufactures, have establish'd together, taking what they have Occasion for, and remitting in its stead what they have enough of and to spare. For Envy never yet possess'd the whole World, nor even the great and considerable Parts of it. And another out of Plutarch, who speaking of the Sea delivers himself thus, ἀγέρον ὄντα &c. Our Life, Wild and Insignificant, this Element has render'd sociable and perfect, rectifying it by mutual Aids and Assistances, and by Exchange and Traffick, creating Conversation and Friendship. To which agrees that of Libanius, εἰ μὴ τοῖς &c. That God has not confin'd and limited his Blessings to any one Part or Region of the Earth, but diffus'd 'em thro' all Nations in such a Manner as may oblige Men by reciprocal Wants to correspond with each other, and by that Means cultivate a Society together, and to this End has he discover'd the Art of Trading, that whatsoever is the Produce of any Nation may be equally enjoy'd by all. And Euripides in the Person of Theseus, reckons Navigation in the Number of those Things that Human Reason had found out for publick Advantage; the Expression is this,

Πόνυ τε ναυσολήμαθ', &c.

*What any Country Wants
Navigation does supply.*

So

has every where provided a shorter way by Sea: That living in the World as in one large House, we might the oftner Visit one another; and every one presenting his Neighbour with what his own Apartment yields, might, in Return, without any difficulty, receive from him what his can afford; and so tho' he possess but a very small share of the Earth, may yet, like the Lord of all, be furnish'd with all the Good Things the Universe can indulge him. And thus too, like Guests at a plentiful Table, we may cut for the Person who sits at a greater distance, and by only putting out our Hands, partake of what the Dish that's next him can gratifie us with.

So *Florus*, Take away Commerce, and you break the Bond that ties Mankind together.

XIV. 1. But it is disputed, whether the Proprietor of the Land can impose a *Duty* on Goods that are transported either by *Land*, or upon a *River*, or some part of the *Sea*, which may be called a Dependance of the adjacent Land. Now it is certain, that Custom having no manner of Relation to the Goods themselves, can no ways be lawfully impos'd upon 'em; neither can any Tax which is laid upon the Subjects to defray the publick Charges be impos'd on Strangers, that are only Passengers through that Country.

XIV. Whether a Duty may be laid on Goods that only pass by.

2. But if for the better Security of such Goods or Merchandise the Prince himself shall be at any Charge, then to recompence this, such Taxes or Duties may be impos'd, but such as shall be no more than equivalent to the Expence, and (q) on this it is that the Justice of all Taxes and Tribute does entirely depend; thus *Solomon* receiv'd Tolls for *Horses* and *Linnen*, that pass'd over the *Syrian Isthmus*. So *Pliny* says, that *Frankincense* could be no otherwise transported than by the *Gebanites*, and therefore (r) Taxes were paid to that King; so, as *Strabo* informs us the People of *Marseilles* were very much enrich'd by a Canal, which *Marcus* brought from the *Rhone* to the *Sea*, *περίτρυμνον* τὸν &c. (s) exacting a Duty from all that were bound

1 King. v.
10, 28. 12.
14.

(q) On this it is that the Justice of all Taxes and Tribute does entirely depend.] See the *Lombard Law*, Tit. xxxi. c. 33. and the *Bishop's Letter* to King *Lewis*, which you may read in the *Institutions* of *Charles the Bald*, c. 14.

(r) Taxes were paid to that King.] Such an Instance you find in *Leo Afer*, not far from the beginning.

(s) Exactling a Duty from all that were bound to or from that Port.] *Aristophanes* alluding to this in his *Avibus*, is for laying an Imbargo

bound to or from that Port; so the same Writer informs us, that the *Corinthians* did by very ancient Custom impose Duties on all Goods, that pass'd over from the *Ægean* to the *Ionian* Sea by Land, to avoid going about the Cape of *Malia*; the same did the *Romans* require for the passing of the *Rhine*, and was likewise given for going over Bridges; as *Seneca* testifies; and as to what relates to the passing over Rivers, our Law Books are all very particular.

3. But it is too frequent, that Impositions of this Nature are excessive, on which account *Strabo* complains of the Officers of the *Arabian* Customs, adding, καλεπὸν γ' &c. *With such imperious and Self-will'd People as these are, 'tis difficult to make any Terms to the Merchant's Advantage.*

XV. A
Right to
Stay for some
Time.

XV. Persons also carrying Goods, or passing by, may, on account of their Health, or for any other just Cause, make some Stay in any Foreign Nation; this being comprehended amongst things innocently profitable. And therefore (t) *Ilioneus* in *Virgil*, when the *Trojans* were forbid to make any Stay on the Coasts of *Afric*, presum'd to invoke the Gods to be Judges of the Injury. And the Complaint that was made by the *Megarenses*, that the *Athenians* had deny'd them the Benefit of their Harbours, was approv'd by the *Græcians*, as being, as *Plutarch* has it, *παρὰ τὰ νόμιμα δίκαια*, contrary to common Justice; so that the *Lacedæmonians*

Imbargo upon the *Air*, that the Gods might be forced to pay Cost for the *Fumes* of their Victims.

(t) Therefore *Ilioneus*.] *Servius* upon that Place. For the Possession of the Shore is his, who takes it; and therefore they are shew'd here to be cruel, who are for prohibiting People even from these common Things. And as *Servius* relates it there, *Hercules* kill'd *Laomedon*, for obliging him to quit the Port of *Troy*.

ans allow'd, that no Cause of making War could be juster than this.

2. And consequently that any little Cottage or Shed may be built upon the Shore, though we grant that this Shore belongs to the People of the Place. For what *Pomponius* says, that leave must be first ask'd, and an Order had of the Magistrate before we build any thing in the Sea, or on the publick Shore, only relates to such Structures as are permanent and lasting. To which purpose is that of the Poet.

*Contracta Pisces aquora sentiunt
Factis in Altum molibus.*

*When in the Sea such mighty Piles are rais'd,
The Fish the Waters straiten'd feel.*

XVI. So likewise, a Freedom of Continuance can be no ways deny'd to such Foreigners, who being banish'd and expell'd their own Country shall come to beg Admission of us, provided they are subject to our Laws, and whatever else shall be thought necessary to prevent Sedition; which Equity the Divine Poet has judiciously observ'd, when he introduces *Aeneas* offering these Conditions:

*The Crown to King Latinus I resign,
His be the Sov'rain Sway.* Dryden's *Virg.*

XVI. Those who are driven out of their own Country have a Right to settle in any other, provided that they submit to the Rules and Government of the Place.

And *Latinus* himself, in *Dyonisius Halicarnassensis*, pronounced the Cause of *Aeneas* to be just, if having no other Habitation he were forc'd thither; for, as *Strabo* from *Eratosthenes* says, 'twould be barbarous to drive away such as come to implore our Protection; neither can the *Spartans* be commended on this account; so in the Opinion of St. *Ambrose*, those People who refuse to admit any Foreigners amongst 'em are very much to blame. Thus the *Eolians* kindly receiv'd the *Colophonians*;

the *Rhodians*, *Phorbantes* and his Companions; the People of *Caria*, those of *Crete*; the *Lacedæmonians*, the *Minyæ*; and the *Cumæans*, some others who came over to 'em. But when the *Minyæ*, after their Reception, were for bearing a part in the Government, what *Herodotus* says of 'em is very just, ἐξυβρίσαι καὶ ποινῶσαι ἐν ὅσῳ, *They were insolent, and acted very impious and unbecoming*. And *Valerius*, that they basely requited a Favour with an Injury.

XVII. A
Right to
waste Pla-
ces, how to
be under-
stood.

XVII. And if there be any waste or barren Land, within our Dominion, that also is to be given to Strangers at their Request, or may be lawfully possess'd by 'em, because whatever remains *uncultivated*, is not to be esteem'd a *Property*, only as far as concerns *Jurisdiction*, which always continues the Right of the ancient People. And (u) *Servius* remarks, that seventy Acres of Harsh and Rugged Land were granted to the *Trojans*, by the Native *Latins*; so we read in *Dion Prusænsis*, ἐπὶ τὴν ἀδίκωτον, &c. that *they commit no Crime, who cultivate and manure the untill'd Part of a Country*. Thus the *Antibarians* formerly cry'd, that *as the Gods have Heaven, so the Earth was given to Mankind, and that therefore all waste and useless Lands are common*; and then looking up to the Sun and Stars, as if present and within hearing, they ask 'em, *whether they were pleas'd to behold a Barren unprofitable Soil, or rather why they did not pour in the Sea upon such Usurpers of Land*. But those general Expressions were but ill apply'd by 'em to the present Case; for those Lands were not waste and desolate, but were employ'd in the feeding of their Soldiers Cattle; which was a just Reason that the *Romans* should refuse 'em. Neither was it less just what the *Romans* formerly

(u) *Servius remarks.*] Out of *Cato*, *Sisenna*, and others of the Ancients.

formerly inquir'd of the *Senones*, what Right any one had to demand a Country from the lawful Owners, and in case of Refusal, to threaten 'em with a War?

XVIII. Having already spoken of the common Right to Things; the next in Course is the common Right to Actions: And this is to be consider'd either Absolutely, to which all Mankind have a Title; or by Supposition, regarding only such and such Persons. The Absolute Right extends to all such Acts, whereby those Things may be procur'd, without which we cannot conveniently subsist, for there is not requir'd a necessity, like that which justifies the taking of what's another Man's; for we are not discoursing here of what may be done without the Owner's Leave, but of the Means of acquiring the same with his Consent, so far, at least, as that he shall not be able to hinder us, either by publick Law, or by private Combination: For such an Impediment would, in the Cases I mention'd, be contrary to the Nature of Society it self; and this is what St. Ambrose calls, (x) separating Men from the Commerce and Dealings of

XVIII. A Right to such Actions as the Occasions of Human Life require.

E 2

(x) Separating Men from the Commerce and Dealings of their common Parents.] Plutarch in his Life of Pericles. speaking of the Megarenses, ἀπὸ τοῦ ποταμοῦ τῶν ἰσθμῶν καὶ τῶν ἁγίων &c. Complaining that contrary to common Justice, they were driven from ev'ry Market and ev'ry Port that belong'd to the Athenians. Seneca in his LXXXVIIth Epistle, reciting that Passage of Virgil.

What will Thrive and rise,
And what the Genius of the Soil denies. Dryden.

These Things are distributed into several Countries, that Men might enter into a necessary Correspondence, if the one should have Occasion for what the other has. And the same Author in his Natural Questions, B. v. c. 15. Why did he engage all People in Trade and Commerce, and thus unite distant Nations? See the Complaints of the English against the Spaniards, in Thuanus B. lxxj. in the History of the Year MDLXXX.

of their common Parent, the denying of those Blessings which were design'd by Nature for the good of All, and a destroying all manner of Society and Conversation at once. For we are not talking here of what is superfluous, and merely for the Gratification of a Luxurious Appetite, but of such Things as there is no living without, such as Food, and Cloaths and Medicines.

XIX. A
Right to
purchase
Necessaries.

XIX. We affirm therefore, that every Man has a Right of buying these Things at a reasonable Rate, unless the Persons from whom we would purchase 'em, have themselves an Occasion for 'em; as (y) in the Time of Famine, the common Sale of Corn is prohibited, and yet even in such an Extremity as this, we cannot expel those Foreigners we have once admitted, but must, as St. Ambrose shews, be common Sharers in a common Calamity.

XX. But no
Right al-
ways to
Sell their
own Com-
modities.

XX. But one has not the same Right or Power of disposing of his own Commodities; for the Buyer has always the Privilege of taking or refusing, as he thinks fit; thus the Dutch did formerly prohibit the Importation of Wine and other Foreign Goods. So Strabo speaking of the Nabatean Arabians says, *ἵστασιν* &c. that (z) some Commodities might be imported there, and some not.

XXI. A
Right to
Marriage
explained.

XXI. I'm of Opinion, that in the Right, I just now spoke of, is also included, a Liberty for the People of one Nation to contract Matrimony with those of another; for instance, if a Company of Men be banish'd their own Country, and

(y) In the Time of Famine, the common Sale of Corn is prohibited] Cassiodorus, B. i. Epist. xxxiv. The store of Corn ought to be, first and chiefly, for the Use and Advantage of the Country where it grows.

(z) Some Commodities might be imported there, and some not.] See Crantzius, B. xi. Saxonie.

and should retire to another; for though 'tis not altogether impossible in Nature, that a Man should live his whole Life without a Woman, yet 'tis what the major part of Mankind would find extremely difficult to do. For Celibacy can be the Choice of none but them, who have a more than ordinary Government of their Passions. And therefore *Marriage* cannot be lawfully deny'd: And in *Livy*, *Romulus* entreated of his Neighbours, that they would not be displeased if one People were willing to mix their Blood and Family with another. So *Canuleius* in the same Author; *We desire Marriage with you, a Thing that's usually granted, not only to our Neighbours but even to Foreigners*; and *St. Austin* testifies, that by the Right of War, the Victor may justly take away her, who was unjustly deny'd him in Marriage.

2. But the Civil Laws of some Countries, which prohibit Foreigners the Privilege of marrying, do it either for this Reason, that when such Laws were establish'd there was no Scarcity of Women in any Nation, or else that they do not here design Marriages in general, but only such as are just, that is, such as produce some particular Effects of Civil Right.

XXII. By Supposition there's a common Right to all those Actions, which any Nation is suppos'd promiscuously to allow to Strangers; for then 't would be an Injustice to exclude any People: For if it be allow'd that Foreigners may any where Hunt, Fish, Fowl, gather Pearls, inherit by Will, sell their Goods, and even, where there is no scarcity of Women, contract Marriages, the same can be refus'd to no other People, unless by some preceding Crime they have forfeited their Liberty; for which Reason it was that the *Benjaminites* were deny'd the Privilege of marrying with the other Tribes.

XXII. A Right of doing what is permitted indifferently all Strangers to do.

Judges xx.

XXIII.

This Right is to be understood of those who are entitl'd to it by the Law of Nature, and not thro' Favour and Indulgence.

But what we have said of Permissions, is to be understood of such Acts as are only allow'd by vertue of a *Natural Freedom and Liberty*, never taken away by any other Law whatever; not of such as are indulg'd by an Act of Grace, by only dispensing with the Laws in Force, for 'tis no Injustice to deny a Man a Favour. And thus I think, that we may reconcile what *Molina* after *Francis Victoria* has observ'd, in a sort of Contradiction to him.

XXIV.

Whether a Contract made with a People to oblige 'em to sell their Commodities to those only, with whom they have bargain'd, and not to any others, be lawful.

I remember I have heard it disputed, whether one Nation may Contract with another to purchase all the Commodities of a particular kind, which are the Produce of that Country only; and I think it may be lawful, provided the Buyer shall be ready to dispose of 'em to others at a reasonable Rate; for it signifies nothing to other People, from whom they are supply'd with what Nature has Occasion for. But in matter of mere Profit one may lawfully prevent another, especially if there be any particular Reason for it, as where the State by such a Contract may be oblig'd to take the other into his Protection, and therefore be at an extraordinary Expence. For such a Purchase, made with the Intention I observ'd, is no ways Repugnant to the *Law of Nature*, though the Civil Laws, out of Regard to the publick Advantage, do sometimes prohibit it.

CHAP.

C H A P. III.

Of the Original Acquisition of Things; where also is treated of the Sea and Rivers.

I. **T**HE *Particular Right* we have to a Thing, is either by *Original* or *Deriv'd* Acquisition. *Original* Acquisition, 'tis possible, might formerly be made, when Men came first to form themselves into a Society, by *Shares* or *Division*, as we observ'd before, but 'tis now by *Seisure* or *Possession* only.

I. *Original Acquisition made by Division or Seisure.*

II. But some may perhaps be of Opinion, that *Original Right* may be also acquir'd by a *Grant* for Services done, or by way of *Mortgage* and *Security*: But if this matter be thoroughly examin'd, 'twill be plain, that this is only a *Titular Right*, the *Real* and *Original Right* being, as before, still in the *first Proprietor*.

II. *Other means of Acquisition rejected; such as the granting an Incorporeal Right:*

III. To the ways of *Acquisition*, *Paulus* the Lawyer adds this, which indeed seems very natural, if we *our selves* could give a thing *Being*. But since nothing can be naturally produced, except from some *Matter* that did it self exist before; therefore if *that* be *ours*, then do we continue our *Property* in what is produced from it: If it be no *Body's*, then is our *Property* in it acquir'd by the *Right* of a *first Possessor*; but if it be some other *Person's*, it can never become our *natural* and *absolute Property*, as will appear by and by.

III. *Or a Specification.*

IV. I. Our Business then now is to consider of *Seisure* and *first Possession*, which *Right* alone, since those Primitive early days, is the *Natural* and *Original Method* of acquiring a *Property*. And of Things not yet any one's *Property*, there are two sorts capable of being possess'd; *Jurisdiction*, and *Pro-*

IV. *Possession is double. Jurisdiction and Property; the Distinction explain'd*

perty as it stands distinguish'd from Jurisdiction. Seneca has thus explain'd 'em, (a) Kings have a Power over all things, but private Persons have only a Right to, and Property in what is peculiarly their own. Dion Pruseensis thus, ἡ χώρα τῷ πόλει. ἀλλ' ἕθεν &c. The Country belongs to the State, but yet is every Man in it Master of his own Possessions. Now there are commonly two things Subjects of Jurisdiction, first Persons, which sometimes alone are a sufficient Subject, as an Army, suppose of Men, Women and Children, that are going in quest of some new Plantations; and secondly, a Place which is called a Territory.

2. But altho' Jurisdiction and Property are usually acquir'd by the same means, yet are they in themselves (b) really distinct; and therefore Property extends not only to those of the same State, but even to Foreigners too, the Jurisdiction remaining as 'twas before. Siculus, in his Book of the Conditions of Lands, tells us, that they who had the Care of assigning and dividing the Lands, finding that

(a) Kings have a Power over all things, but private Persons have only a Right to, and Property in, what is peculiarly their own.] The Passage is in his 7th Book of Benefits. c. 4. In c. 5. there follows, A King possesses all things by Jurisdiction, private People by Property, &c. 6. All Things are Cæsar's; but his Treasury contains only his own private and peculiar Fortune. Symmachus 10 Epist. 54. You govern all but preserve to every one his own. Philo in his Book of Planting, οἱ βασιλεῖς καὶ τὰ κατὰ τὴν χώραν &c. Kings, who are Lords of all the Riches and Estates in their Country, even of what private People seem to possess, are thought to have only what they deliver out to the Management and Disposal of their Stewards and Financers, from whom too they receive their yearly Revenues. Pliny in his Panegyric, The Sovereignty of a Prince is much greater than his Patrimony.

(b) Really distinct.] And therefore in Apollodorus you may see, that tho' the Lands both of Arcadia and Attica were divided, yet there was but one which retain'd πᾶν τὸ χρεῖτον, all the Power and Jurisdiction.

that those of their own Colonies were insufficient, did assign to such Citizens as should come after, a Grant of such Lands as they had taken from the neighbouring Territories; but the Jurisdiction over the Lands thus assign'd, continued in the Power of those Persons whose the Territories were. And Demosthenes, in his Oration de Haloneso, calls those Lands that were within their own Territories, *ἐν ἑαυτῶν, Properties*, but those that lay in another Man's, *ἐν ἄλλου, Possessions*.

V. We have before observ'd, that where the Jurisdiction (or Sovereignty) is already settled, the Right of seizing upon and possessing things moveable, may be render'd void by the Civil Law; for this Right is permitted by the Law of Nature, but no where commanded that it should always be so permitted; nor does Human Society require it. But if any one objects, that this seems to be allow'd by the Law of Nations: To this I answer, that altho' in some part of the World, this is or may be commonly receiv'd, it has not the Force of a general Compact amongst all Nations, but is only the Civil Law of this, or that, or t'other People, observ'd amongst themselves, which each of 'em may at any time repeal if they think fit. And indeed there are many other things of this Nature which our Lawyers style the Law of Nations, when they treat of the Division of things, and of acquiring a Property in 'em.

V. The taking of things moveable may be hinder'd by a Law.

VI. It is also to be observ'd, that if we have regard to the Law of Nature only, Property can only be his, who exercises the Faculty of Reason. But the Law of Nations has so ordain'd it for the common Good, that not only Infants but Mad-men, may both have and keep a Property in things, being by Indulgence consider'd as Human-kind, and not in regard to their particular Defects; for human Laws may enjoin many things that are no where

VI. Upon what Right the Property of Infants and Mad-men is founded.

where commanded by the *Law of Nature*, but can enforce nothing that is contrary to it. And therefore this Right of *Property* is, by the unanimous Consent of all civiliz'd Nations, thus introduc'd in favour of all such Persons, *ad actum primum*, not *ad actum secundum*, as the *Schools* term it; that is, that they shall have the Right of *Possessing*, but not the Power of *using* and *disposing* of what they possess just as they please. For *Alienation*, or a Power of *Conveyance*, and other such like Capacities, do in their very Nature imply an *Act* of the *Will directed by Reason*, and therefore exclude all Children, Mad-men, and Idiots. To which that of St. Paul may be apply'd, *The Heir, tho' he be Lord of all, yet during his Minority differs nothing from a Servant*, that is, as to the Use and free Exercise of his *Property*. We before began to say something of the *Sea*, which we will proceed now to finish.

Gal. iv. 1.

VII. Rivers may be held in Property.

VII. Rivers may be also held in Property, tho' neither where they *rise*, nor where they *discharge* themselves be within our Territory, but they join to both, or to the *Sea*. It is sufficient for us, that the larger part of the *Water* is shut up in our Banks, and that the River, in respect of our Land, is it self small and insignificant.

VIII. Whether the Sea may not be so too?

VIII. By this Instance it seems to appear, that the *Property* and *Dominion* of the *Sea* should belong to him who is in Possession of the Lands on both sides; tho' it be open *above* as a *Gulph*, or above and below as the *Streights*, provided it is not so great a part of the *Sea*, that when compar'd with the Lands on both sides, it cannot be suppos'd to be some Part of them. And now what is thus Lawful to one King or People, may be also lawful to two or three, if they make themselves *Masters* of the *Sea* betwixt 'em, at one and the same time, and agree upon the *Terms* of *Property*;

perty; for 'tis in this manner that *Rivers* running thro' the Lands of two different Nations, have first been possess'd by both, and then divided.

IX. 1. But it must be own'd, that in those Countries that were known to the *Roman Empire*, from the first Ages, even down to the time of the Emperor *Justinian*, 'twas the *Law of Nations*, that no People whatever should claim a *Property* in the *Sea*, no, tho' it were no more than the *Right of Fishing*, neither are they to be regarded who think, that when by the *Roman Laws* the *Sea* is declar'd to be common to all Men, it should be only understood to be the common Right of the *Roman Citizens*. For in the first place, these Terms are in themselves so general, that they can no ways admit of such a Restriction. For what the *Latins* meant, by *Omnium commune*, common to all, *Theophilus* calls κοινὸν πάντων ἀνθρώπων, the common Right of all Mankind. And *Ulpian* says, that the *Sea* is by Nature open and free for all, and is as common as the *Air* it self. And *Celsus*, that the Use of the *Sea* is in common to all the World. Besides, the Gentlemen of the Law do plainly distinguish those things that are publick to People, amongst which *Rivers* are included, from those that are common; for so we read in the *Institutions*, There are some things which are (c) common to all Men by the Law of Nature, and others which are only Publick; By the Law of Nature these, the *Air*, running Waters, the *Sea*, and consequently the *Shore* adjoining, are common; but all *Rivers* and *Ports* are Publick. So in *Theophilus*, φυσικῶς μὲν ἐν δυνάτει κοινὰ πάντων ἀνθρώπων &c. What by a natural Right are common to all Mankind, are these, the *Air*, Water

IX. 'Twas not allow'd formerly in Countries depending on the Roman Empire.

(c) Common to all Men] Michael Attaliates; τινὰ δὲ πάντων ἄνθρωπων &c. some things are ev'ry Bodies, as the *Air*, running Water, the *Sea*, and the *Sea-shore*.

ter that's perpetually flowing, and the Sea. And then presently, *πῶλαμοι ὃ πάντες* &c. But all Rivers and Ports are Publick, that is, Publick to the Roman People.

2. But *Neratius* has said even (d). of Shores, that they are not so Publick as what is the Property of a People, but are as those things which were at first produced by Nature, and are not yet become the Property, either of any Person or any Nation; which seems to be contrary to what *Celsus* writes, 'Tis my Opinion, that thro' the whole Extent of the Roman Empire the Sea-Coasts do properly belong to the Romans; but as for the Use of the Sea in general, 'tis in common to all Mankind. But these two Opinions may be easily reconcil'd, if we say that *Neratius* only meant, as far as the Shore was serviceable to those who sail'd or pass'd by; but that *Celsus* intended a lasting Advantage and Improvement, as for Instance, the setting up a House there; which *Pomponius* informs us could not be done without the *Prætor's* leave, no more than one might presume on a Right of Building in the Sea; that is, in that part of it which is next the Shore, and is, as it were, the Shore it self.

X. But the Law of Nature is not against a Property in a part of the Sea, which is, as 'twere inclos'd in the Land.

X. 1. These things, tho' true in themselves, are drawn only (e) from Custom, and no ways deducible from the Law of Nature: For the Sea, in the Sense that we spoke of, neither is nor can be the Property of any Person; for a River we know is Publick; yet the Right of Fishing in some Creek or Turning of that River may properly belong to some

(d) Of Shores.] In the *Basilic* Eclogues, B. 1. tit. 1. c. 13. οἱ διγυαλοὶ ἐν τῇ παντὶν ἐξουσίᾳ εἰσὶ; Shores are in the Power, and at the Service of all Men. See too B. 53. tit. 6.

(e) From Custom.] Which Custom the *English* pleaded against the *Danes*. See the excellent *Camden* in the Reign of Q. Elizabeth, Anno MDC.

some private Person : Nay also of the Sea it self 'tis said by *Paulus*, that if it can be the Property of a particular Person, he has a Right to prohibit others from meddling with what is his; for this is a private and no publick Case, as far as it concerns the Right of Possession, which Right arises from a private and not a publick Cause; where without doubt he is speaking of (f) some small Portion of the

(f) *Some small Portion of the Sea let into some private Estate.] Salust, Many private People throw down Mountains, and build up Seas. Horace 2d Book of Lyric. Ode 18.*

*Thy Moles and thy incroaching Mounds
Remove thy Floods to streighter Bounds,
For Greedy you would seem but Poor,
Confin'd by Nature's narrow Shore.*

Creech.

And Book 3. Ode 1.

*Now still our stately Squares increase,
The Fish will find their Ocean less;
The Moles thrown in extend the Shore;
The Lord grown weary of the Land
Now builds upon the Ocean's Sand;
And scorns the Bounds that Nature fix'd before.*

Creech.

Vellius Paterculus: Moles thrown into the Sea, and Mountains dug up to admit the Ocean. Seneca in his Collections of Controversies, B. 5. Controv. 5. The Huge Piles, that are thrown in, remove the Seas. Pliny of the Earth, B. 2. c. 63. To admit the Seas: 'Tis tore out for the Waters. Lampridius in Severus speaks of amazing Pools with the Sea let into 'em. Cassiodorus 9. c. 6. With what vast Buildings there have the Shores been finely incroach'd on? How is the Earth advanced into the very Bowels of the Sea? Tibullus,

*A huge large Pile blocks up th' unruly Sea,
That safe within, the wanton Fish may play,
Secure from Winter's Threats;*

Of such Fish-ponds, near the Coast, Pliny treats, B. 31. c. 6. *Columella de Re Rustica*, B. 8. c. 16, and 17. where amongst others he has

the Sea let into some private Estate, as we find it done (g) by Lucullus, and some others. So Valerius Maximus records of C. Sergius Orata, that, by conveying in the Water, and detaining it in his Ponds and Trenches, he had invented and made himself a Sea properly and peculiarly his own. And this very Passage was produced by the Emperor Leo, in contradiction to the Opinion of some ancient Lawyers, concerning the (h) *πρόθυρα*, Entrances of the *stretta di Constantinopoli*, or the Thracian Bosphoros, that they might be damm'd up, and claim'd as a private Right and Property.

2. If then any part of the Sea can be let into the Lands of some private Person, I mean, if it can be shut in there; and is in it self so inconsiderable, that it may be thought a piece of the Estate; this is no ways repugnant to the Laws of Nature; and then why may not that part of the Ocean that is next to the Shore, be the Property of one or more People, which is, or who are in possession of the Shore; especially when such a part of the Ocean, if

has this Observation, The Luxury of the Rich have shut up the very Seas, and confin'd Neptune himself. St. Ambrose has much the same in his *Hexameron* 5. c. 10. and in his c. 3. de *Nabushe*, and *Martial* in several places.

(g) By Lucullus.] Varro of him; When Lucullus at Naples had dug thro' a Mountain, and let into his Ponds the Maritime Rivers, which came in and went out with the Tide; Neptune was not better provided for Fishing. Plutarch in his Life, *πρόθυρα* *Σαλαών* &c. Bringing the Sea and Pipes for conveyance of Fish all round his Seats, and building in the very Ocean places of Pleasure and Entertainment. And Pliny, B. 9. c. 54. Lucullus having cut down a Mountain near Naples, at a greater Expence than he had built a stately House, let in the Tide and the Seas; and was upon this account call'd by Pompey the Great, Xerxes Togatus, the Roman Xerxes.

(h) *Πρόθυρα*.] See Leo's Novella 57, 102, 103, 104. *Attaliates*, pragmat. tit. 94. *Harmonopolus*. B. 2. tit. 1. §. *πρὸς τὰ πρόθυρα*. See too the Great *Jacobus Cujacius*, *Observat.* 14. 1.

if compar'd to the whole *Coast*, is not larger than the smallest *Isle* of the *Sea*, compar'd to a private *Estate*; neither is it any Objection, that the *Sea* is not every where lock'd in, as appears by the Example of a *River*, or the *Sea* that comes up to some Gentleman's *Seat*.

3. But there are many things tolerated by the *Law of Nature*, which the *Law of Nations* by common Consent might prohibit and restrain; therefore where-ever this *Law of Nations* remains in force, and is not repealed by common Consent, the most *inconsiderable* part of the *Sea*, nay, tho' it be almost inclos'd by the *Shoar*, can never be the *Property* of a particular People.

XI. But it is here to be noted, that if in any place this *Law of Nations* about the *Sea* should not be received, or tho' it were, should be afterwards abolish'd, it does not follow that a People, because they are in Possession of the *Shoars*, have any *Right of Claim* to the *Seas adjoining*: Nor is an *Intentional Act* sufficient in this Case; but the *Taking of Possession* must, by an *Overt Act*, be signified and made known. And if afterwards the *Possession* thus gained by the *Right of first Seizure* shall be quitted, then the *Sea* returns to its *Original Nature*, that is, to the *common use* of all *Mankind*; as the *Shoars* are which have no *Building* on them, and as the *Right of Fishing* is in the *Turning* of a *River*, as *Papinius* observes.

XI. Such a Property may be had, and how long it may endure.

XII. But 'tis certain, that he who has this *Dominion* over the *Sea*, can hinder no Person the *Liberty of passing*, provided it be in no *Hostile* manner: Since such a *Passage*, even thro' another's Country, cannot justly be hindered, tho' it be both less *Necessary*, and the *Consequences* of it more dangerous.

XII. Such a Property can give no Right of obstructing an inoffensive Passage.

XIII. 1.

XIII. That there may be a Jurisdiction over part of the Sea, and how.

XIII. 1. Now it may very easily be, that the sole (i) Jurisdiction or Sovereignty over some part of the Sea may be held without any other Property. Nor do I think, that that Law of Nations, of which we have spoken, does any ways oppose or contradict it. The *Argives* did formerly complain of the *Athenians*, that they suffer'd the *Spartans*,

(i) Jurisdiction or Sovereignty over some part of the Sea] Philo of Kings, καὶ τὰ ἀπείρα πλήθει &c. They gained new Seas, infinite both in number and largeness. *Lycophron*,

Ἰὼς καὶ θαλάσσης σκῆπτρα καὶ μοναρχίαν.

The Rule and Monarchy of Sea and Land.

Virgil,

— Neptune shall resign the Fasces of the Sea:
The watry Virgins for thy Bed shall strive,
And Tethys all her Waves in Dowry give.

Dryden.

Julius Firmicus; Possessed of the Sea's and Land's Dominions. Nonnus:

Βερόν χεῖρτ' ἔσχε θαλάσσης.

Beroc Rul'd the Sea.

The Frontiers of the Kingdom of Sweden are in the middle of Oresund Bay. *Johannes Magnus* in his Archbishops of Upsal, c. 15. *Curtius* of Tyre: she not only commanded the Neighbouring Sea, but where-ever her Fleets came. From whence arose the Proverb in *Festus*, the Tyrian Seas. *Isocrates* of the Lacedemonians and Athenians, συνέβη ἐνατέραν χυεῖαν &c. It happened that each of them became Mistress of the Land next the Sea that either of them possessed, and they had a great many Cities subject to 'em. *Demosthenes* of the Lacedemonians in Philippic. 2. θαλάσσης ἡρχον καὶ γῆς ἀπάσης, They govern'd all the Sea and Land. The Writer of *Timotheus's* Life, When this was done the Lacedemonians desisted from their long Contention, and voluntarily yielded to the Athenians the Maritime Sovereignty. The Author of the Oration about *Halonesus*, inserted among those of *Demosthenes* speaking of Philip of Macedon, εἰδέν ἄλλο ἢ τὸ το σῆζων &c. Desiring nothing else of you, but to be put in Possession of the Sea, and that you would confess that without Philip you are not able to maintain your

Autho-

tans, who were their Enemies, to pass unmolested thro' their Seas, looking upon this a Breach of a Contract that was betwixt them, in which 'twas decreed that no one People should permit or tolerate the Enemies of the other to pass, διὰ τῆς ἑαυτῶν, thro' any Part of their Jurisdiction. And by the one Year's Truce of the Peloponnesian War, a free Passage was granted to the Megarenses not
VOL. II. F only

Authority there. The Emperor Julian says of Alexander, that he engag'd in Wars purely out of this Design and Intention, ὅπως γῆς τε ἀπάσης καὶ θαλάττης χύειτο γένοιτο. That he might be Lord of every Land and Sea. His Successor, Antiochus the Illustrious, in Gorionides, Are not the Land and Sea all mine? And Theocritus of Ptolomy, another Successor of his,

Πολλὰς δὲ κρατεῖ γαίης, πολλὰς δὲ θαλάσας.

He many a Land, and many a Sea commands.

And again,

Θάλασσα δὲ πᾶσα καὶ αἶα,
καὶ ποταμοὶ κελύδοντες ἀνάσσειαι Πτολεμαίῳ.

Every Land and Sea and River own
Subjection to Ptolomy's mighty Crown.

'Tis time to come to the Romans now. Thus Hannibal addresses Scipio the Elder in *Liby*. We Carthaginians shut up in Afric's Coasts can see you, since so it has pleas'd the Gods, rule distant Foreign Empires both on Land and Sea. And Claudian of Scipio the Younger;

When first, engag'd to his Country's Laws
Did force the Spanish Ocean to submit.

The Romans therefore, Salust, Flora, Mela, and others, call all the Sea within the Straights Mouth theirs; but Dionysius Halicarnassensis adds more, πᾶσης κρατεῖ θαλάσσης &c. They (the Roman People) command every Sea, not only that within Hercules's Pillars, but the whole Ocean too as far as 'tis possible to be sail'd on. And Dion Cassius speaking of them, πᾶσης σχεδὸν βασιλευσίνης γῆς καὶ θαλάσσης, Governing almost every Land and Sea. Appian in his Preface describing the Largeness of the Roman Empire, subjects to it

only thro' their own Seas, but those of their Confederates, τῇ θαλάσῃ ὅσα ἂν κτ' τὴν ἑαυτῶν κ' κτ' τὴν συμμαχίαν. So *Dion Cassius* said, θαλάσσαν, τὴν τῶν Ῥωμαίων πασαν, Every Sea that belongs to the Romans. And *Themistius* speaking of a Roman Emperor,

it the *Mar Maggiore*, the *Propontis*, the *Streight of Gallipoli*, the *Archipelago*, the *Pamphylian* and *Egyptian Seas*. That to *Pompey* was granted the *Sovereignty* of all the Sea within *Hercules's Pillars*. So *Plutarch* and *Appian*. Philo against *Flaccus*, ἀφ' ἧς τὴν ἡγεμονίαν ὁ Σεβας &c. From which time *Caesar's House* has got the *Empire of Land and Sea*. *Ovid* of *Augustus*,

The Sea shall serve him too.

An *Inscription* in Honour of him, *The World by Land and Sea* hush'd and quiet. *Augustus* for Peace obtained by Land and Sea, has three times shut up the *Temple of Janus Quirinus*; attested by *Suetonius*; who of him says too, He placed a *Fleet* at *Monte Miseno*, and another at *Ravenna*, for the *Security* of the upper and lower Sea. *Valerius Maximus* to *Tiberius*, Gods and Men have unanimously agreed, that the *Rule of Sea and Land* should be yours. Philo of the same Prince, γῆς κ' θαλάσσης ἀναψάμενον κτ' κατέχευε, Having both Land and Sea at his Disposal. The same Author of *Caius*, *Tiberius's* Successor, Γαίον μετὰ τὴν Τιβερίου &c. *Caius* after the *Death* of *Tiberius*, assuming the *Dominion* of every Land and Sea. *Josephus* calls *Vespasian*, δεσπότην κ' γῆς κ' θαλάσσης, Lord of Sea and Land. The same Jurisdiction does *Aristides* in many Places attribute to *Antoninus*. *Procopius* tells us of *Statues* of the Emperor holding a *Globe*, ὅτι γῆν τε αὐτῷ κ' θαλάσσαν δεδούλοισι, because both Land and Sea were in Subjection to him. *Nicetas Patricius* is, in the Letters of *Lewis II.* called the *Keeper of the Adriatic Coast*. And *Constantinus Monomachus* is in *History* styl'd γῆς κ' θαλάσσης κυεῖν κ' δεσπότης, Lord and Master of Land and Sea. And the *Archipelago* is reckon'd among the *Provinces* of the *Roman Empire*. *Procopius Gothic.* 3. says that the *Franks* commanded the Sea at and about *Marseilles*. Of the Rights of the States of *Venice*, see *Paruta*, B. 7. and the special *History de Usquehis*. To these may be added the more Modern *Lawyers* upon c. *Ubi Periculum de Electis* in 6. *Bartolus Angelus*, *Felinus* in c. *ad liberandum in Principio*; de *Judicis*. *Baldus* ad tit. digest. de *rerum divisione*, Col. 2. *Afflicus* in tit. *qua sint regalia*. *Cacheranus* decision. *Pedemont* 115. Num. 4. where from *Baldus* he says, that all the World makes use of this Right. *Albericus Gentilis* *Advocat. Hispanic.* 1. 8.

peror, τὴν γῆν καὶ θάλασσαν ὑπηκοὸν ἔχων, *having both Land and Sea subject to him.* So Oppianus to the Emperor;

Σοὶς μὲν γὰρ ὑπὸ σκήτροισι θάλασσα εἰλεῖται.

The Seas confess no other Laws but thine.

So Dion Pruseensis in his 2d Oration to the People of Tarsus, amongst the many Privileges that were granted by Augustus to that City, mentions, ἕξ-
τιαν τῷ ποταμῷ τῆς θαλάσσης καὶ ἀπὸ αὐτῆς, *the Domi-
nion of the River (Cydnus) and that part of the Sea
adjoining to it.* So we read in Virgil,

— Should hold the World in Awe,
And to the Land and Ocean give the Law.

Dryden.

In Gellius, *The Rivers that flow into such Seas as are
subject to the Roman Empire.* And Strabo observes,
that the People of Marseilles took abundance of
Prizes, when in their Engagements at Sea, they
conquered τὰς ἀμφοιβησίβας τῆς θαλάσσης ἀδίκως,
those who unjustly disputed the Ocean with them.
And that Sinope commanded the Sea among the
Cyanæ Islands.

2. Now the Jurisdiction or Sovereignty over a part of
the Sea may be acquir'd by the same means as other
Jurisdictions usually are, that is, as we said above,
either by the means of Persons, or by the means of
Territory. By the means of Persons, when a Fleet,
which is a Sea-Army, shall ride in such a part of
the Sea: By means of Territory, when from the
Land they can command those who are in the ad-
F 2 joining

XIV. A
Duty upon
some certain
Occasions
may be im-
posed on
those who
go by Sea

joining part of the Sea, as conveniently as if they were actually upon the Land.

XIV. Neither is it contrary to the *Law of Nature*, or that of *Nations*, that those who shall take upon 'em the Burden and Charge of securing and assisting *Navigation*, either by erecting and maintaining *Light-houses*, or by fixing *Buoys*, to give Notice of Rocks and Sands, should impose (k) a reasonable *Tax* upon those who *Sail* that way. Such was that which the *Romans* levied upon the *Red Sea*, to defray the Charges of a Fleet against the Excursions of Pirates; and that Duty which (l) the People of *Constantinople* demanded in the *Euxine Sea*; and that which the *Athenians* long

(k) *A reasonable Tax*] The *Rhodians* formerly demanded Custom of the Islands, even of *Garophalo*, at *Scanderia*, as *Ammianus* observes. And *Caesar* in Gaul remarks of the *Venetians*, that being situated in an open and tempestuous Sea, where there are but few Ports, and those in their Possession, they make almost all those who use that Sea pay them Customs. *Florus* of the *Romans*, A Noble People, robb'd of the Dominion of the Sea, and their Islands forced from 'em, were ashamed to pay those Contributions which they us'd to raise. *Pliny*. B. 6. c. 22. mentions one *Anninus Plocamus*, who farm'd of the Exchequer the Customs of the *Red Sea*. The same Author, in the next Chapter, discoursing of the Sea that's the Road to the *Indies*, 'Tis every Year scour'd by the Guards and Artillery, which are maintain'd by Contributions. For the Pirates mightily infest it. See some famous Disputes about the Manner and Measure of Customs in *Camden's Elizabeth*, Anno 1581 and 1602.

(l) *The People of Constantinople demanded in the Euxine Sea*] *Herodian*, in his Life of *Severus*, takes Notice of the *Constantinopolitan* Impost. And *Procopius*, as well in his Public as his Secret History, mentions an old Tax paid in the *Hellepont*, and of a new one at the Mouth of the *Mar Negro*, and in the *Streights of Stamboli*. That of *Stamboli* was levied at *Blasburn*; that of the *Hellepont* at *Abydos*, as *Theophrastus* informs us. *Agashian*, B. 5. calls that at *Abydos* *δρακόνειον*, a Duty on every Tenth Share: *Irene* lessened it. The Emperor *Immanuel Comnenus* granted to some Monasteries *δαδάσια δίκαια*, the Customs arising from the Sea. This *Balsam* tells us upon the 4th Canon of the Council of *Chalcedon*, and upon the 12th Canon of the 7th Synod.

long before impos'd on the same Sea, when in Possession of *Chrysopolis*, both which are mention'd by *Polybius*. And that, which (m) *Demosthenes* against *Leptine* shews, the same *Athenians* required in the *Hellepont*; and which *Procopius* says in his secret History, that the *Roman Emperors* in his Time did.

XV. 1. We have also some Instances of Articles, by which one People has engaged with another, not to Sail beyond such and such Bounds: So 'twas formerly agreed between the *Kings* bordering on the *Red Sea* and the *Egyptians*, that the *Egyptians* should not come into the *Red Sea* with any *Man of War*, nor with above one *Merchant Ship*; so betwixt the *Athenians* and *Persians*, (n) in *Cymon's Time*, that no *Median Ship* that carried Arms should Sail between the *Cyaneæ* and the *Promontory of Taurus*, and between the *Cyaneæ* and *Phaselis* after the Battel at *Salamin*. In the one Year's Truce of the *Peloponnesian War* it was stipulated, that the *Lacedæmonians* should not Sail with long Ships, nor with any other Vessels of above five hundred Talents burden. And in the first League which (a) the *Romans* made with the

XV. of
Treaties
which for-
bid some
People to
pass beyond
certain pro-
scrib'd
Bounds.

F 3

Car-

(m) *Demosthenes against Leptine.*] The same Author, in the same Place says, that the *Athenians*, by possessing *Stamboli* were made Masters of that Sea. The Scholiast *Ulpian* says, that the *Tenth* was taken off there.

(n) *In Cymon's Time.*] This is that *αἰὶνν νεκρὸν* of *Plutarch*, that Peace which made so much Noise in the World, by which it was stipulated, that the *Persians* should keep off from the Sea the distance of an *Horse Race*, that is 40 Furlongs. *Isocrates* too mentions it in his *Panathenæicon*.

(a) *The Romans made with the Carthaginians.*] *Servius* upon that Passage of the 4th *Æneid*,

Littora litoribus contraria.

Our Shores oppos'd to theirs.

Dryden.

Because

Carthaginians, immediately after the Expulsion of their Kings, they agreed, that neither the *Romans*, nor any of their *Allies*, should Sail beyond the Promontory *Pulchrum*; and that if at any time they should be driven further, either by a Storm, or an Enemy, those who were thus driven should carry nothing with 'em but only Necessaries, and should be obliged to depart in five Days time: And (p) in the second League it was agreed, that the *Romans* should neither Cruize nor Trade beyond the *Promontorium pulchrum*, *Massia* and *Tarsejum*. In the Peace with the *Sclavonians*, that they should not pass beyond *Lessum* with more than two Barks, and those unarm'd. In the Peace with *Antiochus*, that he should not Sail on this side the Promontories of *Calycadnus* and *Sarpedon*, unless with such Ships as should carry Tribute, Ambassadors, or Hostages of War.

2. But

Because it was provided by an Article of the Peace, that neither the *Romans* should come to the *Carthaginian* Shoars, nor the *Carthaginians* to the *Romans* Shoars. Such another League did the *Romans* make with the People of *Taranto*, *μη πλεῖν Ῥωμαῖοι πρὸς ὡ λαινίας ἀκρας*, That the *Romans* should not Sail beyond Cabo delle Colonne. This is out of *Appianus* in Excerpt. ad Legation. *Strabo*, B. 16. reports, that all Foreigners who sailed as far as *Sa-degna*, or beyond the *Streights Mouth*, were drowned by the *Carthaginians*.

(p) In the second League.] One Article of this was that the *Romans* should not touch at *Africa*, or at *Sardegna*, unless it were to take a Convoy, or to repair their Shipping. After the third *Punic* War, the *Carthaginian* Senate were severely reprimanded; because that, contrary to their Engagements, they had an Army on Foot, and Provisions for Sea Service, as 'tis recorded by *Livy*, B. 48 and 59. 'Twas something like this which was granted to the *Sultan* of *Egypt*, upon a Treaty with the *Greeks*, that he should have the Liberty of sending two Ships once a Year cross the *Bosphorus*. This Passage is in *Gregoras*, B. 4. One of the Conditions formerly of *Antiochus's* Peace was, that he should not have more than twelve Men of War. *Appian. Syriac.* By virtue of their Treaties, Men of War are by the *Venetians* prohibited entering the *Gulph* of *Venice*. See *Thuanus*, B. 80, in the Year 1584.

2. But these do no ways prove either the Possession of the *Sea*, or the Right of Navigation. For *Nations*, as well as particular *Persons*, may give up not only that *Right* which is *properly* their own; but that also which they have in *common* with all Mankind, in favour of him for whose Interest it may be: And when this happens, we may say as *Ulpian* did, in the Case of an *Estate* sold, on Condition that the Right of *Tunny Fishing* should be preserved to the *Seller*; that there could be no Obligation of *Service* imposed on the *Sea*, but that, for the Credit of the Contract, the *Conditions* of the *Sale* ought to be observed and executed. And therefore, that both the *Persons* in present Possession, and their Heirs or Successors, are obliged to *stand to such an Agreement*.

XVI. I. It is often disputed amongst Neighbouring People, whether the Bounds of the *Jurisdiction* be not altered as often as the River that runs betwixt 'em changes its Course; and whether the Addition that the *River* thus makes may not properly belong to them to whom it is made. Which Controversie must be determined from the Nature and Manner of the *Acquisition*. Surveyors inform us, that there are *three* sorts of Lands; one sort is *divided* and *marked out*, which *Florentinus* the Lawyer calls *limited*, because 'tis limited with *Artificial* Fences: Another is *assign'd in Gross*, or (*q*) compris'd within some certain and determinate Measure, as *Hundreds*, *suppose*, and *Acres*; and a *third* is *Arcifinious*, call'd so, as *Varro* observes, because it has (*Fines arcendis Hastibus idoneos*) Boundaries fit to keep the Enemy out, that is; it has *Natural* Boundaries. Such as

XVI. Whether if the Course of a River be changed, it alters the Territory, explained with a Distinction.

F 4

Rivers

(q) Comprised under some certain measure.] See an Instance in *Servius* upon the 9th Eclogue.

Rivers and (r) *Mountains*. And these are what *Aggenus Urbicus* styles *Occupatory*, because they are generally such Lands as are *occupied* or *possess'd*, either as being *Vacant*, or else by the power of the *Sword*. In the two first Instances, tho' the *River* should change its *Course*, yet is there nothing of the *Territory* chang'd. And if the *Inundation* leaves any thing behind it, it shall accrue to the *Jurisdiction* of those in *Possession*.

2. But in *Arcifinious* Lands (s) the *River*, by gradually altering its *Course*, does also alter the *Borders* of the *Territory*; and whatsoever the *River* casts up to the opposite side, shall be under his *Jurisdiction*, to whom the *Augmentation* is made; because 'tis highly probable, that when either *Nation* did originally enter upon the *Sovereignty*, 'twas with this *Intention*, that (t) this *River* being in the *middle* between 'em, should, as a *natural Boundary*, part 'em from one another. *Tacitus* said, *That the Rhine being sure of its Channel*, (u) *would serve for a Frontier*. And *Diodorus Siculus* relating the *Controversie* that was between the *Inhabitants* of *Egesta* and *Selinus* says, *τοταυτὴ τὴν χῶρον ὁρίζοντο*, *The River bounding the Country*.

(r) *Mountains*,] *Tacitus*, of *Germany*; It's parted from the *Sarmatians* and the *Dacians*, by *mutual Fear*, or by *Mountains*. *Pliny*, B. 36. speaking of the *A'ps*, *We carry away what was designed for Boundaries to separate Nations*.

(s) *The River by gradually altering its Course*.] See *John Andrews* and others cited by *Reinsingius*, B. 1. *Class.* 5. c. 1.

(t) *This River being in the middle between 'em, &c.*] You have an Example of this in the *River Vedajus*, in *Mariana*. B. 29.

(u) *Would serve for a Frontier*.] *Spartianus* to *Adrian*; In many places where the *Barbarians* are separated, not by *Rivers*, but by *Land-Marks*. *Prince Constantine*, c. 45. calls the *River Fasso* σύνορον, a *Coefine*.

Country. And *Xenophon* calls such a River simply *ἡ ὁρίστια*, the *Frontier*.

3. The Ancients report, that the River *Ache-
lous* keeping no constant steady Course, but one
while dividing it self into several Branches, ano-
ther while running here and there in a violent
cross Stream, (which gave Rise to the fabulous
Story of its being chang'd into a *Bull* or a *Serpent*)
was the occasion of frequent Wars between the
Etolians and *Acar-nanians* about the adjacent Land,
'till *Hercules* confin'd it to its proper Banks; and
for the important Service, had the Honour of
marrying the Daughter of *Oeneus*, King of the
Etolians.

XVII. 1. But this will only take place where
the River has not chang'd its *Channel*; for a River
that separates Governments, is not to be consider'd
barely as Water, but as Water confin'd in such
and such Banks, and running in such and such a
Channel. Wherefore a little Addition, Diminu-
tion, or Alteration, does not at all change the
Thing it self, provided the *whole River* taken to-
gether remains as usual. But if the *Looks* of the
whole be intirely *alter'd*, 'tis then a quite diffe-
rent thing: And therefore as when any *River* is
damm'd up above, and a Passage made to convey
the Waters another way, 'tis no more the *same*,
but a *new River*. So in case a River should force
its way through some unusual Passage, and (x)
entirely forsake its former Channel, it is no more
the River that it was before, but a *new* one. So
too if a River should be exhausted or dried up,
the Bounds and Limits of those Countries it di-
vided,

XVII.
*What judg-
ments must
we make, if
the Channel
be quite al-
ter'd?*

(x) Entirely forsake its former Channel.] As the River *Bardanus*
in *Asen*, *Commen. B.* 1.

vided, would be then determin'd by the middle of the Channel that is next to 'em; for we may reasonably presume, that People desired to be naturally parted by the intervention of a River; and that if the River should at any time cease, each might possess what he had before: And the same is to be observ'd if the *Channel* should be *alter'd*.

2. But in any doubt of the Bounds of a State, those Lands that reach to some *River* are to be reckon'd *Arcifinious*, because nothing is so proper for the Distinction of Nations, as those Fences which *Nature has provided*, and which are not easily pass'd over. But that Nations should have Artificial Bounds, or be compris'd in particular Dimensions, very rarely happens; and if so, it's rather by *another's Grant*, than by *Original Acquisition*.

XVIII.

A River belongs sometimes wholly to one Territory.

XVIII. But tho', as I said, in case of any Doubt, the Jurisdictions on each side reach to the *middle* of the River that runs betwixt 'em, yet it may be, and in some places it has actually happen'd, that the River *wholly* belongs to *one* Party; either because the *other* Nation had not got Possession of the other Bank, 'till later, and when their Neighbours were already in compleat Possession of the whole River, or else because Matters were so stipulated by some Treaty.

XIX.

*Things that are quit-
ted, are the
Right of
the next Possessor, unless
the State
lays claim
to a general
Property.*

XIX. 1. Nor is it undeserving our Observation, that the Seisure of such things as have had an Owner once, but are now without one, either because they are voluntarily quitted, or because the Owners themselves are dead and gone, is to be judg'd an Original Acquisition: For in such a case things return to their *Primitive State* and Condition.

2. And

2. And 'tis likewise to be observ'd, that these *Original Acquisitions* are sometimes order'd by a *People* or a *Prince* in such a manner, that not only the *Jurisdiction* and *Sovereignty*, which comprehends that *eminent Right* we have elsewhere spoke of, but also that the actual and compleat *Property* is in general, and in the first place, design'd for and vested in that *People* or *Prince*; and that afterwards a particular *Distribution* is made amongst *private Persons*, but so that all *their Property* should still depend upon that *Prior Property*; if not, as the *Right* of a *Vassal* upon the *Right* of his *Lord*, or the *Right* of a *Tenant*, upon the *Right* of him who owns the *Farm*; however, by some slighter sort of *Dependance*, as there are many kinds of *Right* to a thing, among which is the *Right* of him, who upon a certain *Condition* expects a *Feoffment in Trust*. Thus *Seneca*, (y) 'Tis no *Argument* at all, that because you may not dispose of, consume or alter what you have, 'tis therefore not yours; for that too is yours, which is conditionally such. So *Dion Prusænsis* in his *Rhodiaca*, *μυρίους γὰρ εὐρησάτε τρόπους ἔτε.* For you have invented ten thousand ways of calling a thing our own, and these do all vastly differ; some must not sell what they have, others must not use 'em as they please. And in *Strabo* we meet with, *κύριος ἦν πλὴν τῆς πωροῦσθαι*, He was Master of it, excepting the Power of selling it. Now an Example of what we have been speaking of, *Tacitus* gives us in the *Germans*, They take Possession of as much Land in general,

(y) 'Tis no *Argument* at all] This Passage is in his 7th Book of *Benefits*, c. 12. And in the 8th Book on that Subject, c. 12. Some *People* own things upon a certain *Condition*.

general, as the number of those who can cultivate and improve it amounts to, and then they divide it among themselves, with regard to every Man's Circumstances and Capacity.

3. Since then the Properties deriv'd on particular Persons by this Distribution, do depend upon the general Property, if it should so happen that any thing should want a particular Owner, it does not belong to the next who finds and Seizes it, but (2) returns to the Publick, or to some Superior Master. And a Right like this, may in another case, be introduced by the Civil Law, as we have already hinted.

(2) Returns to the Publick, or to some superior Master.] So at the end of the second Book of the *Odyssey*, you find that the Goods of him who died without Children, came to the People. And so *Eustathius* Interprets that of *Homer's 9th Iliad*.

Χρησται δὲ τὰ κληῖον διατίθησιν.

The Magistrates his Estate in Shares dispos'd of.

for he says the Χρησται were the Magistracy, who were entialed to the Effects of those who died without Issue. Histories inform us, that there was something like this practis'd formerly in the Kingdom of Mexico.

CHAP.

CHAP. IV.

Of a Thing presum'd to be quitted, and of the Right of Possession that follows; and how such a Possession differs from Usucaption and Prescription.

I. 'TIS not easie to determine how far the Right of *Usucaption* or *Long Possession* does extend. For whereas this Right receives its Being from the *Civil Law* (*Time*, as such, having no Power to produce any Thing, for nothing is done *by Time*, though ev'ry Thing be done *in Time*) in *Vasquez's* Opinion, it cannot take Place between two *Free People* or two *Kings*, or between a *Free People* and a *King*; no nor between a *King* and a *private Person* who is no Subject of his, (a) nor between the Subjects of *different Princes* or *States*; which seems plausible enough, unless the *Thing* or the *Act* in Dispute is oblig'd to the *Laws* of that Country. And if we should allow this to be true, a great Inconvenience would follow; the Disputes about *Kingdoms* and their *Boundaries* would never be at an End: Which, as it directly tends to create much Uneasiness in Mens Minds, and to destroy the Peace and Tranquility of the Publick, by sowing *Wars* and *Discords* among us, so is it contrary to the common Sense of Nations.

I. *Why Usucaption or Prescription properly so call'd, has nothing to do among different People or their Sovereigns.*

II. For in the Holy Scriptures too, when the *King* of the *Ammonites* demanded of *Jephthah*, the Lands that lay between *Arnon* and *Jabbok*, and from

II. *But even among these long Possession is frequently urg'd as a Right.*

(a) *Nor between the Subjects of different Princes and States.*] In the Law of the 12 Tables there was this express Indulgence, *Have an Eternal demand upon your Enemy, that is, upon any Foreigner.*

from the Desarts of *Arabia*, as far as the River *Jordan*, he pleaded 300 Years Possession, and ask'd why he and his Ancestors had so long neglected to lay Claim to 'em. And we find in *Isocrates*, that the *Laconians* laid it down as an avow'd Maxim, (b) establish'd by the Consent of all Nations, that *Publick*, as well as *private Possessions*, are in a long Course of Years so secur'd and ascertain'd that they can never be recover'd; by which Right of *Long Possession* they put off those, who requir'd *Messena* of 'em. The Greek Words are; τὰς κληρονομίας καὶ τὰς ἰδίαις καὶ τὰς κοινὰς, ἣν ἐπιγένηται πολὺς χρόνος, κυρίας καὶ πατρίας, ἀπαντες εἰς νομίζουσι, *All the World declare it as a Law, that Possessions both Private and Publick, do in Process of much Time, become Proper and Paternal.* And the same *Isocrates* writing to *Philip*, καλοχρον καὶ βέβαιον ἔστι κληρονομία, *Time having made the Possession firm and lasting.* And it was this Right that induced the later *Philip* to declare to *Tit. Quintius*, that he would set those Cities at Liberty which he had taken, but that he would by no means part with the Just and Hereditary Possession of those which were deriv'd down to him from his Ancestors. *Sulpitius* in a Dispute against *Antiochus* proves, that he could not in Equity deprive the *Grecians* of the Freedom they had so long enjoy'd, for no other Reason, but because they were once Slaves in *Asia*. And nothing is look'd upon by Historians to be more Foolish and Absurd, than to pretend to (c) revive *Ancient Titles*; they call it *Vaniloquentiam*, speaking

(b) *Establish'd by the Consent of all Nations.*] To this purpose the Duke of *Nivernois* pleads for *France*, in *Thuanus* B. lix. at the Year MDLXXIV.

(c) *Revive Ancient Titles*] Such old-fashion'd Claims the *Greeks* out of the *Attic History Style*, τὰ πρὸ Ἑυκλείδου, *Things that happen'd*

speaking to no Purpose; and *Diodorus*, μυθιαὺς καὶ παλαιὰς ἀποδείξεις, *Fabulous and Antiquated Remonstrances*. Thus *Cicero* in his second Book of Offices, (d) *Is there any Reason, why Lands that a Man has been possess'd of Time out of Mind, should be taken from Him?*

III. What shall we say then? Tho' all Right does depend upon the *Will*, yet the bare *Intention* is not sufficient to make a Right, unless that *Intention* be some way or other express'd. For, since the *Thoughts* of Man cannot be discover'd but by outward *Signs*, it would be absurd and repugnant to Human Nature, to give so much Efficacy to a bare *Intention*. Upon which Account it is, that the mere inward Acts of the Mind do not come under the Cognizance of Human Laws. Nor do *Signs* indeed give us a *Demonstrative*, but only a *Probable Moral Certainty* of the *Intention* of the Mind; for Men do not always speak or act, as they design and think. However, it seems necessary for the very Being of Society, that the *Intention* plainly signified, should have Force sufficient to transfer a Right: For which Reason a clear Declaration of the Mind will hold good against the Person, who has so declared. And thus is the Affair relating to *Words* dispatch'd and made easy.

III. The Reason of Possession inquir'd into from the Conjectures of a Man's Will and Intention, which Conjectures are deriv'd not from Words only;

IV. I. A

pen'd before *Euclid's Days*; among several others who use this Expression, *Nicetas* does particularly in his first Book of *Alexius*, *Isaac's Brother*, where he is speaking of the Emperor *Henry*, Son of *Frederick*, καὶ ταῦτα δὴ τὰ πρὸς Ἐυκλείδου ἀνοποδῶς ἀνακενῶν, and he had the Confidence to move Matters that were done before *Euclid*.

(d) *Is there any Reason, why Lands, &c.] Florus*, B. iii. c. 13. Time, however, by as Good a Right as that of Inheritance, had settled 'em in the Country their Ancestors left 'em.

IV. But
also from
an Overt-
Act or
Deeds done :

IV. 1. A Man is presum'd to relinquish his Right to a Thing by an *Overt-Act*, when he has quitted it or thrown it away, unless it appears by some Circumstances, that he did it only *occasionally*, and with a Design of taking it again. Thus (e) when a *Note under Hand* is return'd, the Debt or Obligation is suppos'd to be discharg'd. A Right of Inheritance may be pass'd away, says *Paulus*, not only by Words but by Actions, or any other Indication of the Will. Thus if a Man, who owns a Thing, should *make a Bargain* with the Person who is in Possession of it, as if he was the *True and Lawful Proprietor*, he may reasonably be suppos'd to *Resign* his Right ; and why a Right cannot be made over the same way, between *Kings and Free People* no Reason can be assign'd.

2. It is much the same, as if a Magistrate should *allow or command* one under his Government, to do that which the Law forbids ; he is presum'd then to Release him from the Obligation of that Law. For 'tis not from the *Civil Law*, but from the *Law of Nature*, that ev'ry one has the Liberty of *parting with his own*, and 'tis a very natural Presumption, that one should be thought to *design and intend* that, which he has sufficiently *signified* that he did *design and intend* ; 'tis in this Sense, that we may properly understand what *Ulpian* has asserted, that an *Acquittance by Word of Mouth*, is a Discharge founded upon the *Laws of Nations*.

V. And
from an In-
action or a
Forbearance
of Acting.

V. 1. But even an *Inaction*, or a *Forbearance of Action*, if attended with some particular Circumstances, may Morally be comprehended under the Notion of *Action*. Thus a Man by his *Silence*, in case

(e) *When a Note under Hand is return'd.* See the second Law D. de pactis.

case he is upon the *Spot*, and knows what he is doing, gives his *Consent*; which the *Mosaic Law* does also allow, *Num. xxx. 5* and *12*; unless it appears that he was aw'd into *Silence*, or any other way hinder'd from speaking. Thus our *Right* to any Thing, (f) that we have long given over for *Lost*, is forfeited, as when an *Hog* is carry'd off by a *Wolf*; and *Ulpian* says, that the Owners of Ship-wreck'd Goods lose their *Property* in them, not immediately, but when they have laid aside all Hopes of Recovering 'em, intimated by their not expressing any Tokens of their being in such Hopes. For if they should send People to look for 'em, and promise a *Reward* to the *Finder*, the Case would be quite alter'd. Thus again, should a Man knowingly and willingly suffer another to enjoy what's his for a considerable Time, without demanding it, it might be concluded from his Forbearance that he designed to part with it altogether, and looked upon it to be no longer his *Property*. And 'tis to this Effect, that *Ulpian* has somewhere said, that a *Landlord* is thought to relinquish his Right to an House, if he neglects for several Years to ask for his *Rent*. 'Tis far from *Just*, (reply'd the Pious Emperor) to require that Interest, which by long Forbearance you are presum'd not to have expected, because you forbore to demand it, only that you might the more ingratiate your self with the Person indebted to you.

2. There's something very like this in *Custom*. For this too (setting aside the *Civil Law*, which Confines it to a certain Time and Manner) may be introduced by the *Subjects*, if the *Sovereign* tolerates and connives at it. What space of Time is requir'd to give *Custom* the Sanction of a *Law* is

VOL. II.

G

not

(f) That we have long given over for *Lost*.] The Jewish Lawyers call This *WIN* Despair.

not *determin'd*, but is *Discretionary*, however, as much at least as is sufficient to shew that the *Consent* was *Universal*.

3. But before we can safely presume from a Man's *Silence*, that he has relinquish'd his *Right*, *two* Circumstances are necessary to be observ'd; That he should know that he *has* such a *Right*, and That he should *Voluntarily* decline it; for (g) he who *forbears* to *act thro' Ignorance* cannot in *Justice* suffer for it, and where it appears that his *Silence* proceeded from any other Cause, we can never fairly *guess* at his *Intentions*.

VI. How
Time join'd
with Non-
Possession
and with
Silence con-
duces to the
Conjecture
that the
Right to the
Thing is
quitted.

VI. Now that these *two* Circumstances did concur, is farther evidenced by other *Conjectures*, and particularly by that of *Time*, which is of great Weight in the Proof of both. For it is hardly conceivable, that the *Knowledge of his Right* should for so many Years escape him, since *Time* affords so many *Opportunities of knowing* it. Though indeed it does not require so much *Time* to make a *Conjecture* when the Parties are *present*, as when they are at a *Distance*, even tho' the *Civil Law* were silent in the Matter; neither can it be suppos'd but that the Fear which might once be impress'd, will wear off in *Time*, which offers him so many *Opportunities of providing* for his Security, either by his *own* Care or by the Assistance of his *Friends*; he may fly out of the reach of the Person fear'd, and then at least protest his *Right*, or, which is better, appeal to proper Judges.

VII. Bu

(g) He who forbears to act thro' Ignorance cannot in Justice suffer for it.] See below in this Book. c. xxii. § 11. If you have an Opportunity, you may also consult Bart. Soc. Conf. clxxxvii. col. and Meischnerus, Decis. Cameral. ix. n. 113. Tom. iii.

VII. But because (b) a Space of Time, which exceeds the Memory of Man, is in a Moral Sense taken for Infinite, therefore a Silence of so long a Continuance will ever be sufficient for a Conjecture, (i) unless very good Reasons be alledged to the contrary, that the Thing in Dispute is really *quitted*. 'Tis indeed wisely observ'd by some more Eminent Professors of the Law that Time Immemorial (k) is not the same exactly with an Hundred Years, though they do not often very much differ; because (l) the Life of Man is commonly computed at an hundred; and this Term of Years is what does usually make up (m) the three Ages or Generations of Men; which three Generations, or Time Immemorial, the Romans pleaded against Antiochus, when they shew'd him that he demanded of 'em Cities, which neither He, nor his Father, nor his Grandfather had ever had Possession of.

VII. That a Time exceeding the Memory of Man is commonly sufficient for such a Conjecture and what such a Time is.

G 2

VIII. 1. It

(b) *A Space of Time which exceeds the Memory of Man.*] Andrew Knich in his Treatise, de Jure Territorii. Reinking, B. i. Class. v. c. 11. n. 5. Oldendorp. Class. iii. Art. 2.

(i) *Unless very good Reasons be alledged to the contrary.*] Menochius 1. Conl. xc.

(k) *Is not the same exactly.*] This Balbus of Prescriptions has observ'd, and Covarruvias upon the same subject; so Reinking in the aforelaid B. i. class. v. c. 11. n. 40. About Time Immemorial, see the Learned Faber in his Plea for the Dutchy of Montserrat.

(l) *The Life of Man is commonly computed at an hundred.*] Ἀνὴρ ὁ μᾶλλον ἢ περὶ χροῶν, the Age of Man, or rather his Time, said Justinian in his Fifth Edict, publish'd in the Notes upon Procopius's Secret History.

(m) *The Three Ages or Generations.*] For γενεά, a Generation, is τετραχολαετία, an Age of thirty Years, as Porphyry remarks in his Homeric Questions. Herodian in his Life of Severus expounds three Generations, a Century. Philo in his Embassy takes Notice, that in the Space of three hundred Years, there were Ten Kings in Egypt. In Lacedemonia there were Fourteen Kings in five hundred Years; as Plutarch shews in his Life of Lycurgus. And Justinian in his clix Novel, forbids a Cause to be brought into Court, because Four γενεαί, Generations, were already pass'd since any Thing was moved in it.

VIII. An
Answer to
the Objection
on that
no one is to
be presum'd
willing to
abandon or
throw away
what he
has got.

VIII. 1. It may be objected, that since all Men love themselves, and are fond of what's their own, 'tis not to be suppos'd that they will be inclin'd to part with it; wherefore a mere *Forbearance* of *Acting*, though for ever so long a Time, cannot be a sufficient Ground for such a *Conjecture*. But on the other Hand, since we ought to judge *Charitably* of all Mankind, we must not imagine that one Man, for the sake of a Trifling Thing, will suffer another to live, as it were, under the Guilt of a perpetual Sin, which many Times he cannot avoid without such a *Dereliction*.

2. As for *Crowns*, though they are commonly so highly valued, yet must we know too, that they are great and weighty *Burdens*, and which, if not worn *well*, expose the Prince to the Wrath and Resentment of God; and, as it would be thought unjust in *Guardians* to waste a *Minor's* Estate in contending for the *Ward*; or, to use *Plato's* Simile, in *Mariners*, at the *Hazard* of the *Ship* to Dispute the Management of the *Helm*; so those Princes are far from deserving Commendation, who with the *Ruin* of the *State*, and frequently with the *Blood* of an Innocent People, ambitiously strive for the *Government*. The Ancients mightily applauded *Antiochus*, who return'd the *Romans* Thanks (n) for easing him of too *Large* and *Troublesome* a Province, by contracting his *Dominions*. Among several bright Passages in *Lacan*, this is none of the least Beautiful.

Tantóne Novorum

Proventu scelerum querunt uter imperet Urbi?

Vix tanti fuerat Civilia Bella movere

Ut Neuter.

What!

(n) For easing him of too Large and Troublesome a Province.] Jonathan the Son of Saul seems to have been of this Opinion.

What! Is all this Train, of New, unheard of, Crimes, Only to decide which of these Two shall Rule A distracted City? To exclude 'em Both Was scarce worth half this Blood and Discord.

3. 'Tis for the Interest, doubtless, of Human Society, that the *Titles to Crowns* should be one Time or other settled, and put out of all Dispute; wherefore such *Conjectures*, as conduce to that End, ought the more Readily to be embraced. For if (o) *Aratus Sicyonius* thought it hard for private People to lose those Possessions which they had enjoy'd for fifty Years, how much more reasonable is that of *Augustus*, who pronounced him a *Good Man*, and a *worthy Citizen*, who is not for making any *Alteration* in the present State of publick Affairs; and who, as *Alcibiades* has it in *Thucydides*, ὅπεις ἐδίδξατο γῆμα τῆς πολιτείας, τὸτο ζυνοδιασώζει, preserves the same Form of Government as was deliver'd down to him; which *Isocrates* against *Callimachus* terms, τὴν παρῶσαν πολιτείαν διαφυλάττειν, maintaining the present Government: And *Cicero* too, in his Speech to the Romans against *Trullus*, says, that 'tis the part of ev'ry one, who has a Value for the Peace and Property of his Country, always to defend the State of the Common-wealth, whatever it be; and *Livy*, that ev'ry very good Man is pleas'd with the present Condition of the Publick.

4. Though what we have urg'd were not sufficient to answer the Objection of ev'ry ones being desirous of preserving what he has got, yet a more convincing Argument remains, that it is by no means probable, that a Man should intend the obtaining of his Right, and yet in so long a Time (p) give no proper Indication of such his Intention.

G 3

IX. And

(o) *Aratus Sicyonius*] So likewise *Thrasylbulus*, when he had made Peace with *Athens*, left the Estate and Possessions just as they were before.

(p) Give no proper Indication of such his Intention] *Grantzins*, Saxon. xi. n. 10 and 13.

IX. It appears, that without any Conjecture at all, an Immemorial Possession transfers and constitutes a Property.

IX. And perhaps it may, with a great deal of Probability be said, that this is an Affair not founded on bare *Presumption* only, but (q) on the *Law of Nations*, by vertue of a general Agreement among 'em, that *Possession, Time out of Mind*, without *Interruption* or *Appeal*, should absolutely transfer a *Property*; for 'tis reasonable to suppose, that Men might agree to that, which would so much contribute to the common Peace of Mankind. I purposely mention'd a *Possession, without Interruption*; that is, as *Sulpitius* in *Livy* speaks, *has been held by one and the same perpetual Tenor of Right, without any Intermission whatever*. Or as the same Author in another place calls it, *A continued Possession that was never call'd in question*. For a *Desultory* inconstant *Possession* is not sufficient to constitute a *Right*, as the *Numidians* objected to the *Carthaginians*, that the *Property* was invested sometimes in them, and sometimes in the *Kings of Numidia*, never fix'd in any, but shifting from one to another, according to the various Fate of War.

X. Whether Persons not yet born, may not, in this manner, be depriv'd of their Rights

X. 1. But here another very intricate Question arises; Whether those who are not yet Born, can by such a *Dereliction* or *Forsaking*, tacitly lose their *Right*? If we say that they cannot, what has been already advanced will not much contribute to the quiet Enjoyment of *Crowns* and *Possessions*, since most of those things are *Hereditary*, and the *Successors* due. And if we affirm that they can, it looks a little strange, how *Silence* should prejudice those who were not capable of speaking, because not yet in *Being*; or how what one does should be a *Detriment* and *Disadvantage* to another. 2 In

(q) On the Law of Nations, by vertue of a General Agreement among 'em] *Gregoras* reports, that when *Phocæa* was granted to the Nobility of *Catanz*, there was a Law added, that all and every of their Successors should be oblig'd to declare in Writing, that they only held it by the Title of Administrators, *μη λαβόν* &c. Left a long course of Time should pass unobserv'd, and at last wrong the Crown of its just Right and Property.

2. In order to clear up this Difficulty, it must be observ'd, that he who is not yet *Born*, can have no *Right*, as that *Substance* which is not yet in *Being* has no *Accidents*. Wherefore if the People (from whose *Will* the *Right* of Government is deriv'd) should think fit to alter that *Will*, they cannot be conceiv'd to injure those that are *unborn*, because they have not as yet obtain'd any *Right*. Now as this *change* of *Mind* may be *openly* and expressly *declar'd* by the People, so may they also be suppos'd to have *tacitly* chang'd it. If then it be granted, that the *Will* of the People is *alter'd*, (r) whilst those who might be expected to come *hereafter* have no *Right*; and the *Parents* too, from whom those, who are *one Day* to possess this *Right*, are to be descended, shall give up that *Right*; I can see no Reason why the *Property* of a thing thus *relinquish'd* and *given up*, may not be transferr'd to another.

3. What we are talking of is from the *Law of Nature*; for in the *Civil Law* I am sensible, that as other *Suppositions*, so *this* also may be introduced and fancy'd, that (s) the *Law personates those who are not yet in Being*; and by this means prevents any *Seizure* or *Possession* that may be made to their *Prejudice*: But this must not rashly be suppos'd to be the *Intent* of the *Laws*, because tho' it would be for the *Interest* of *private Persons*, yet would it be of vast *Disadvantage* to the *Publick*. Whence

G 4

it

(r) *Whilst those who might be expected to come hereafter, have no Right.* There are several Instances in Histories of such *Derelictions*. See in *Mariana*, B. 13. c. 18 an *Illustrious* one in *Lewis* the Ninth King of *France*, who for himself and *Posterity* renounced all his *Claim*, which by *Right* of his Mother *Blanch* he might have had to the *Crown* of *Castile*.

(s) *The Law personates those who are not yet in Being*] As the *Civil Law* does in an *Estate* that is depending, or not yet enter'd upon.

it has been generally thought, that those *Fœdal Tenures*, which are not held by vertue of the *Right* of the last *Possessor*, but by *Ancient* and *Primitive Investiture*, may, in length of Time, become *our Own*. And this that able Lawyer *Covarruvias*, supported by substantial Reasons, extends to the Rights of *Ancestry*, and to Things subject to a *Feoffment in Trust*.

4. I can't indeed see any Reason, why the *Civil Law* may not introduce a Right which cannot be alienated by any one single *Act*; and yet that Right, to avoid the *Uncertainty* of *Possessions*, may, if not challenged within a stated Time, be forfeited; but so, that those, who shall *hereafter be*, and should have been entitl'd to it, may have a good Action against *them* who lost it by their Neglect, or against their *Heirs*.

XI. That even the Right of Sovereign Power may be obtain'd either by a King or a People by long Possession.

XI. It is plain from what has been said, that a Right may be translated from one *King* to another, and from one *Free People* to another; as by an express Consent, so also by a *Dereliction*, and that taking of *Possession* which follows it, or which receives some new Force and Virtue from it. For tho' it be an allow'd Maxim, that *what is Originally Invalid, can never be made Valid by any later Act*, yet does it admit of this Exception, *unless some new cause, capable of it self to create a Right, shall intervene*. Thus the true and undoubted Sovereign of any People may part with his Crown, and become a Subject to his Subjects; and he who was really no King, but a *Man of Quality* only, (1) may become sole and absolute Monarch; and that *Supreme Power* which was lodg'd before entirely either in the

(1) May become sole and absolute Monarch.] See *Vasquez* in his first Book of *Illustrious Controversies*. c. 23. 3. and B. 2. c. 82. 8, 9. &c. See too *Panormitanus*. B. 1. Conf. 82. and *Peregrinus*, de Jure Fisci 6. c. 8. §. 10.

the *People* or the *Prince*, may be divided between 'em.

XII. 1. 'Tis also worth our while to inquire, whether those Laws which relate to *Usucaption* or *Prescription*, and are enacted by him who is invested with the Sovereign Power, can affect the Right of *Sovereignty* it self, or of its *Essential Parts*, which we have pointed out in another place. Those Gentlemen of the Law, who decide all Controversies about the Supreme Power by the *Civil Law* in use among the *Romans*, do generally hold it in the *Affirmative*. But (*u*) we are of a different Opinion; for in order to make a Man subject to Laws, a *Power*, and a *Will*, at least a *presum'd* one, are requir'd in the *Legislator*. No Man can lay *himself* under the Obligation of a Law, because no Man is *Superior* to himself: Upon which account it is, that *Legislators* may repeal their own Laws, and substitute others in their stead. A Man indeed may be subject to his own Laws, not *Directly*, but by *Reflexion*, (*x*) as he is a *Part* of the *Community* from *natural Equity*, which ordains, that *every Part* should conform to its *whole*: Thus *Saul* did in the beginning of his Reign, as appears from the Sacred History, *Sam. xiv. 40.* But this Distinction has nothing to do here, because we look upon the *Legislator* here, not as a *Part*, but as virtually containing the *Whole*; for we

XII. Whether the Civil Laws of Usucaption and Prescription oblige him who has the Sovereign Power: This explain'd with some Distinctions.

(*u*) We are of a different Opinion.] So is Don Garzias Mastrill. de Magistratu B. 3. c. 11, 26. Joh. Oldendorscius, conf. Marp. 5. num. 47. Vol. 1.

(*x*) As he is a part of the Community.] Look lower in this B. Tit. 20. §. 22. Seneca in his 85th Epist. A Pilot has two Persons; one in common with all who are on Board the same Vessel, as he's a Passenger, the other peculiar to himself as he's a Pilot. This Affair is treated of by Claud. Seifellus, de Rep. Gal. B. 1. Chassaneus de Gloria Mundi, Part 5. Conf. 5. Gaillius B. 2. Obs. 55. Num 7. Bodin. de Republica, B. 1. c. 8. Reinkink 1. c. 12.

we are speaking of the *Supreme Power* consider'd as *such*. Nor can we presume that there was any Concurrence of the *Will*; because 'tis not to be suppos'd, that those who enact Laws, are *willing* to include themselves, unless where both the Matter and the Reason of the Law are Universal, as in *Prizing of Goods*. Besides, there is no Comparison between *Supremacy* and other Circumstances; it infinitely exceeding them in Dignity and Excellence. Nor did I ever meet with any *Civil Law*, that treated of *Prescription*, which comprehended, or could with any shew of Probability be thought to design the Comprehension of the *Supreme Power*.

2. Whence it follows, not only that the *Time* limited by the Law is not sufficient to acquire the *Supreme Power*, or any *Essential Part* of it, if the above-mention'd *Natural Conjectures* are wanting: But also that there's no occasion for so long a space of Time, provided that these *Conjectures* can be *enough* confirm'd in less: Wherefore too, the *Civil Law* that does not authorize a Possession 'till such or such a Time, does no ways regard the Affairs of the *Supreme Power*. 'Tis true indeed, the *People*, when they first invest a Person with this Power, may, if they please, appoint a *fix'd* and *stated Time*, in which the *Right of Sovereignty*, if so long neglected, should be forfeited; which *Determination* of the People ought not to be violated even by the *Prince*, tho' of absolute Authority; because it does not so much respect the *Sovereignty* it self, as the manner of holding it: Which *Distinction* we have spoken of somewhere else.

XIII. Those Rights of Sovereignty that may be separated from it, or be communicated to others, are gain'd and lost by Usurpation or Prescription.

XIII. But as for those things that are neither *Essential* to the *Supreme Power*, nor *natural Properties* of it, but may be either naturally separated from it, or at least be in *common* to others, they are entirely govern'd by the Civil Laws of every People

People that inforce *Usucaption* and *Prescription*. So we find some *Subjects*, who have obtain'd by *Prescription*, that there shall no *Appeal* lye from them; but yet in such a manner, that something like an *Appeal* may be made either by *Petition*, or some other *Method*. For that there should no *Appeal* lie from a *Person*, is a *Circumstance* inconsistent with the *Condition* of a *Subject*, and therefore can belong only to the *Crown*, or some one of its *Prerogatives*: Nor can it be gain'd but by virtue of a *Natural Right*, which is Superior to the highest Powers upon Earth.

XIV. 1. From hence it appears how far that, (y) which some advance, may be admitted, that
 " 'Tis always allowable for *Subjects* to recover, if
 " they can, their *Liberty*, that *Liberty* which Peo-
 " ple in general have a *Title* to; because the
 " Government that was got by *Force*, may by
 " Force be dissolv'd: And if it was the Result
 " of a *Free Act* of the *Will*, Men may repent of
 " it, and alter that *Will*. But these Folks would
 do well to consider, that the Powers which were
 originally gain'd by *Force*, may afterwards by a
 Tacit Consent grow into a *fix'd* and *establish'd*
Right; and that *Right* which was given by the
Free Act of the *Will*, may by the manner of giving
 it at first, or by some later *Act* be so confirm'd,
 as not any ways to depend upon the same *Will* for
 the future. King *Agrippa* in *Josephus*, in his Speech
 to the *Jews*, who for their preposterous Desire
 of, and Endeavours after *Liberty*, were styl'd *Zea-*
lots, tells 'em, 'Tis now too late to aim at *Liberty*.
 'Twas formerly your *Duty* to have fought for the De-
 fence of it: For *Slavery* is a severe Experience, and
 Arms

XIV.
 The Opinion
 that Sub-
 jects may at
 any time as-
 sert their Li-
 berty, re-
 futed.

(y) Which some advance.] As *Vasquez* in his above-mention'd
 B. 2. c. 82. n. 3.

Arms to prevent it are Honourable. But he, who once vanquish'd, Revolts, is not to be call'd a Lover of Liberty, but a bold Rebellious Slave. And Josephus himself to the same Folks, (z) 'Tis glorious to engage and draw in the Cause of Liberty, but this should have been done long ago. For when People have been once over-power'd, and have for a great while submitted, to shake off the Yoke then, is to act like Madmen and Desperadoes, and not like Friends to Liberty. And 'twas this very Answer that Cyrus made formerly to an Armenian King, who cloak'd his Rebellion with a pretended Desire of regaining his Ancient Freedom.

2. However, I see no Reason to doubt, but that a long Forbearance or Indifference in the Prince, such as we have above describ'd, will justify Subjects resuming the publick Liberty, upon a Presumption that he has *quitted the Crown.*

XV. Those Rights which are merely Discretionary, are never lost by Time; this explain'd.

XV. As for those *Rights*, which are not *continually* exercis'd, but only at some certain *convenient* time, (zz) as the *Redemption* of a *Pawn* or *Mortgage*; as also those *Rights* that we are at our *Liberty* to use when we please, provided that the *present Act* is not directly *contrary* to 'em, but is comprehend'd in *that Liberty* as a *part* in the *whole*; for Instance, a Man has enter'd into a *Correspondence* and *Alliance* with *one Neighbour* only, and continued it for an *hundred Years*, when at the same time he might have done the like with *other Persons*, had he had a *Mind* to it; those *Rights*, I say, are not by *Prescription* lost, 'till being *prohibited*

(z) 'Tis glorious to Engage and Draw in the Cause of Liberty, but this should have been done long ago.] You'll find almost the very same words in the Count of Blanderas's Speech to the People of Milan, in Radevicus 1. c. 40.

(zz) As the Redemption of a Pawn or Mortgage] See Paruta in his History of Venice vii.

ted to exercise 'em, or oblig'd to forego 'em, we give sufficient Intimation of our willingly submitting to such Terms: Which being agreeable not only to the *Civil Law*, but to that of *Nature and Reason*, may be also justly in force amongst even Men of the highest *Quality and Fortune*.

CHAP. V.

Of the Original obtaining of a Right over Persons; where also is treated of the Right of Parents: Of Marriages: Of Societies: Of the Right over Subjects: Over Slaves.

I. **W**E have a *Right*, not only over *things*, but over *Persons* too, and this *Right* is originally deriv'd from *Generation*, from *Consent*, from *Misdemeanor*. By *Generation*, *Parents*, both *Father* and *Mother*, acquire a *Right* over their *Children*; but if their *Commands* should run-counter, and from thence (a) a *Dispute* should arise which has

I. The
Right of
Parents o-
ver Chil-
dren.

(a) *A Dispute should arise which has the greater Authority, the Father's Power is to be prefer'd.* Seneca in his 3d B. and 19th Controvers. The first Obligations are to the Father, the next to a Mother. St. Chrysostom on 1 Cor. xi. 3. *ἐκός τῶς &c.* The Wife ought to submit to her Husband; for equal Respect creates quarreling. And on the Ephesians, c. iv. *ἀρχὴ δευτέρῃ ὡς ἡ κεφαλὴ τοῦ σώματος &c.* The Woman is the second in Power; let her not therefore claim an equal Regard and Honour (for she is under a Head) nor let the Man despise her for being thus Inferior to him; for she is his Body. And then again, *δευτέρῃ ὡς &c.* She is the next in Authority; she has an Authority too, and a large share of Respect, but yet the Husband has something more his due. St. Austin in his 191st Epist. *A Child born in lawful Marriage is more at his Father's than his Mother's Disposal.*
And

the greater Authority, the *Father's* Power is to be prefer'd in regard to the *Dignity* of the *Sex*.

II. A Division of Seasons in Children; where too of Children's Property in things.

II. I. And here in *Children* three Seasons are to be carefully observ'd and distinguish'd. The *first* Season, that τὸ βεβουλευτὶς ἀτελὲς of *imperfect Judgment*, as *Aristotle* speaks, when they have no *λογισμὸν*, Faculty of *Choice*, as he elsewhere calls it. The *second* Season, that of *perfect Judgment*, whilst the Child is yet a Member of the Parent's Family, *ἕως αὖ μὴ χωρεθῇ*, as long as he is not separated or gone from it, as the same *Aristotle* expresses it. The *third*, when he has left that Family. (b) In the *first* Season, all the Actions of *Children* are under the Government and Direction of their *Parents*; for 'tis but Reasonable, that he who cannot Rule himself, should be rul'd by some Body else. 'Tis *Æschylus's* Opinion and Observation,

*Ætas prima, ceu Brutum Pecus,
Ut educetur mentis alienæ indiget.*

Our Infant Age, as thoughtless Cattle, wants,
To rear it up, another's Prudence.

And certainly none can be found so proper for this Charge, as a *Father* and *Mother*, Nature pointing out this Care to them, as to the fittest Persons.

2. Not-

And *Gregoras*, B. 7. where he is speaking of *Andronicus Palæologus*, and *Irene*, *μεγαλειτέρα* &c. And this was likewise subjoin'd, that the *Father* has a greater Power than the *Mother*; nor can any thing hinder the *Father's* Will, in regard to his Child, to be observ'd and done before that of the *Mother*. Of the respect due to a *Mother*, see *L. Congruentius*, C. de *Pædis*.

(b) In the *first* Season, *Maimonides* in his *Penæntial Canons* c. 6. §. 2. says, that *Children* are at that Age as much their Parents Property, as any their other Goods and Chattels.

2. Notwithstanding this, *Children* in their *Infancy* are, by the *Right of Nations*, capable of inheriting an *Estate*, tho' by Reason of that *Imperfection of Judgment*, we spoke of, the Exercise of that Right be, for a time, suspended. They have a Right, as *Plutarch* speaks of *Children*, ἐν κτήσιν to the *Possession*, not ἐν χρήσιν to the *use* of it. Wherefore the *Law of Nature* does not allow *Parents* to take to themselves all that belongs to their *Children*, but only the *By-Laws* of some certain *People* do permit it, which also in this *Affair* distinguish the *Father* from the *Mother*; *Children* under their *Parents* Tuition, from those who are not so, and *Natural* ones from *Legitimate*; Distinctions that *Nature* knows nothing of: She acknowledges no Difference but that I mention'd, of the *Dignity* of the *Sex*, where any *Competition* shall happen between 'em about each other's *Authority* and *Preeminence*.

III. In the *Second Season*, when *Age* has ripen'd their *Judgment*, no other *Actions* but such as are of some *Moment* and *Consideration*, and (c) directly concern the *State* of the *Father's* or *Mother's* *Family* are subject to the *Conduct* of *Parents*; and this only, because 'tis but *Just*, that what makes a *Part* of the *whole*, should conform its self to the *Interest* of the *whole*. As for other *Actions*, *Children* then have ἐξουσίαν, that is, a *Moral Faculty* of acting as they think fit, though even in these are they oblig'd to please their *Parents*. But this *Obligation*, not being by vertue of a *Moral Faculty*, as those above are, but proceeding from *Piety*, *Veneration* and *Gratitude*, does not invalidate what is done contrary to this *Duty*; no more than

III. Of the Season past Childhood, but continuing in the Family.

(c) Directly concern the State of the Father's or Mother's Family.] So *Maimonides* explains the *Law*, which is laid down, *Numb. xxx. 10.*

than a Deed of Gift made by the Owner of the Thing would be *Null* and *Insignificant*, because granted against the *Rules* of *Good Husbandry*.

IV. Of the
Right of
Compelling
or Restraining
Children.

IV. During both these *Seasons*, the *Right* of *Governing* comprehends also the *Right* of *compelling*, so far as Children are either to be forced to their *Duty*, or corrected and reformed. As for what is our *Opinion* of more *Rigorous Punishments*, we shall give you to understand that in some other Place.

V. Of the
Right of
selling
Children.

V. But, though the *Paternal Authority* is so fix'd and inherent in the *Father's Person* and *Character*, that it can never be taken from him and transferr'd to another; yet may a *Father naturally*, and where the *Civil Law* does not obstruct it, pawn his *Child*, and (d) sell him too, if there be a *Necessity* for it, and no other way of maintaining him. Which *Right* other Nations seem to have borrow'd from that *Theban Law*, (which *Ælian* mentions in his second Book) which *Law* the *Thebans* receiv'd from the *Phœnicians*, they from the *Hebrews*; and which very *Law*, *Apollonius* tells us, in his *Epistle* to *Domitian*, obtain'd among the *Phrygians* too. Because *Nature* is suppos'd to grant a *Right* to ev'ry Thing, without which, what the *commands* cannot be compass'd and brought about.

VI. Of the
Season past
Childhood
and out of
the Family.

VI. In the *Third Season*, or Stage of *Filial Life*, the *Child* is altogether ἀνεξάρτητος, at his own *Disposal*, that *Obligation*, however, of *Piety* and *Veneration* remaining still in *Force*, because the *Reason* of it is *perpetual*, and never ceases. From whence

(d) And sell him too, if there be a *Necessity* for it.] *Jornandes* in his *Gothic History*; This is what even *Parents* do here, who, consulting the *Preservation* of their *Children*, had much rather they should lose their *Freedom* than their *Lives*, and therefore out of mere *Kindness* sell 'em for a *Maintenance*, rather than keep 'em to starve and perish at *Home*. I find there has been the same *Custom* among the *People* of *Mexico*.

whence it follows, that the Actions of *Kings* cannot, on the Account of their having their *Parents* living, be Null and Void.

VII. (e) Whatever is not contain'd in these Principles, proceeds from some *Voluntary Law*, which varies according to the Difference of Places. So by the Law which God gave the *Hebrews*, a Father's Power over his *Son* or *Daughter* to disannul their Vows, was not perpetual, but lasted only (f) so long as they continued in their Father's House. Thus the *Roman* Citizens had a sort of Paternal Power over their Children peculiar to themselves, as long as they were not Legally Freed, though they were *Heads* of *Families* of their own. And this was such a Power, as the *Romans* confess'd that other People had not over their Children. *Sextus Empiricus*, *Pyrrhon*, B. iii. οἱ Ῥωμαίων νομοθέται &c. (g) The *Roman* Legislature has injoin'd Children to be their Fathers mere Slaves; and that the Children's Goods should not be at the Disposal and Direction of the Children, but their Father, till they obtain their Freedom, as other Slaves do. But this is rejected by others, as *Barbarous* and *Tyrannical*. And *Simplicius* in *Epictetus's* Manual, οἱ Ἰταλικοὶ ὡς Ῥωμαίων &c. The *Ancient Roman* Laws having a Regard both to that

VII. A
Distinction
of the Na-
tural and
Civil Power
of Parents.

VOL. II.

H

Sup-

(e) Whatever is not contain'd in these Principles, proceeds from some *Voluntary Law*.] *Seneca* of Benefits, B. iii. c. xi. Because 'tis for the Advantage of a Youth to be govern'd, we have sett over him a sort of *Domestick Magistrates*.

(f) So long as they continued in their Father's House] Otherwise the Son at Fourteen Years of Age was by the Custom of the *Hebrews* capable of laying himself under the Obligation of a Vow or an Oath; for so say the *Expositors* upon the abovementioned Place in *Numbers*.

(g) The *Roman* Legislature] *Philo* in his Embassy, ἡ δὲ ὕψ &c. For the entire Jurisdiction and Power over the Son, is by the *Roman* Laws lodg'd in the Father.

Superiority which Nature gives to Parents, and to the Pains and Labour their Children cost 'em, and also willing that Children should be altogether subject to them; at the same Time, I presume, depending upon that Affection which Nature inspires Parents with, have indulg'd to Parents the Liberty, if they please, either of selling or killing their Children with Impunity. Such another Paternal Right in use among the Persians, is condemn'd by Aristotle as a Piece of Tyranny; I was willing to mention this, for the more accurate Distinction of Things Civil from those that are Natural.

VIII. of
the Hus-
band's Right
over his
Wife.

VIII. 1. That Right over Persons which arises from Consent, is deriv'd either from Fellowship or Subjection. The most Natural Fellowship is that of Marriage; but because of the Difference of Sex, the Authority is not equal; the Husband is the Head of the Wife in all Conjugal and Family Affairs, because the Wife is a Part of the Husband's Family, and 'tis but reasonable, that the Husband should have the Rule and Disposal of his own House. If there be any other Prerogative of Husbands, as the Privilege allow'd 'em by the Jewish Law of invalidating ev'ry Vow the Wife made, and among some People, that of selling their Wives Goods, this is from Human Laws, and not from Nature. 'Tis here therefore requisite to inquire into the Real Nature of Marriage.

2. Marriage then we look upon to be, in its Natural State, a certain Familiar Conversation between a Man and a Woman, which puts the Wife as it were under the immediate Inspection and Guard of her Husband. For such a sort of Conversation, we may observe even among some Dumb Creatures. But besides this, in Man who governs his Actions by Principles of Reason, there's also the Fidelity that the Wife obliges her self to keep inviolate towards her Husband.

IX. 1. Not

IX. 1. Nor does *Nature* seem to require any Thing more to *Constitute* a *Marriage*, nor even the *Law of God*, before the *Propagation* of the *Gospel*. For (b) before the *Law* Persons even of the greatest Holiness had several *Wives* at once, (i) and in the *Law* too, are there many Precepts directed to those who have several *Wives* at one and the same Time; and the *King* is order'd not to multiply to himself too many *Wives* and *Horses*; where the *Hebrew* Interpreters remark, that the *King* was allow'd *Eighteen Wives* or *Concubines*, and God observes to *David*, that he had given him several *Wives*, and those too *Women* of *Note* and *Quality*.

2. So likewise is there a *Manner* and *Method* prescrib'd to him, who had a *Mind* to part with his *Wife*, nor is any *Body* prohibited *Marriage* with the *Woman* so divorced, except he who did divorce her, (l) and the *Priest*. But this *Liberty*

H 2

IX. Whether an Incapacity of parting with a Wife or a Confinement to one, are Essential to Marriage from the Law of Nature, or only from that of the Gospel.

Deut. xxi.

15.

—xvii.

16 17.

2 Sam. xii.

8.

Deut. xxiv.

4.

of

(b) Before the *Law* Persons even of the greatest Holiness.] St. Chrysostom of *Sarah*, καλέειν πάλιν ἐπεδάσε &c. And she on the other Hand was willing and desirous that he might have some Satisfaction, for her not bearing him Children, by the *Woman* who was her *Servant*; for as yet such Things were not prohibited. See the same Author upon 1 Tim. iii. St. Austin de Doctrina Christiana, B. iii. c. xii. For many Things were at that time done upon a Principle of Duty, which cannot now be done but out of Lust and unbridled Passion. And in his xvth de Civitate Dei, c. xxxviii. Because on the Account of multiplying Posterity, no *Law* did forbid the having several *Wives* at once.

(i) And in the *Law*.] Josephus Antiq. Histor. xvii. 1. πατέριον ἐν ταύτῳ πλεόνειν ἡμῖν σιωποῦν, 'twas the Custom of our Country for us to live with several *Women*, at the one and the same Time.

(k) That he had given him several *Wives*, and those too *Women* of *Note* and *Quality*.] Josephus in the above cited Place of his History, δόντ' αὐτῷ καὶ γυναῖκας ἀς δικάως καὶ νομίμως ἠγάγετο, giving him *Wives* which he justly and lawfully marry'd. Pesiatha upon Levit. xviii. says, 'tis very notorious that he who asserts that 'tis forbidden to have several *Wives*, knows nothing at all of the *Law*.

(l) And the *Priest*.] Levit. xxi. 7. To the Divorced *Woman* is

H 2

also

of passing to another Husband, was by the Law of Nature so far restrain'd, as that no *Confusion of Issue* might thence arise. And from this came that Question of the *Canon Law* in *Tacitus*: *Whether she who had conceiv'd and was not yet deliver'd, might Lawfully marry.* Among the *Jews* the Intervention of *Three Months* was injoin'd. But the *Law of Christ* as it has brought other Matters, so has it also this of *Matrimony* to a greater Degree of Perfection, by pronouncing both him who parts with his Wife, except for *Adultery*, and him who Marries her, *Guilty of Adultery*. And his Apostle and Interpreter, *St. Paul*, not only gives the *Husband* Power over the *Wife's* Body, which by the State of Nature was allow'd him (ὁ ὡς κεφαλὴ τοῦ σώματος &c. *For he who is join'd to a Woman, is by the Laws of Marriage, absolute Master of her Body, says Artemidorus*) but also grants the *Wife* Reciprocally a Power over the *Husband's* Body. And (m) *Lactantius*; 'Tis not here as in the *Law of Nature*,
where

also added a *Widow*, there, and at the 14th; which *Philo*, and most of the *Modern Expositors*, because of what follows in the 10th Verse, and immediately after, understand of the *High Priest*. But *Ezekiel*, xlv. 22, and in his Explanation of the Law, makes it evident that it is to be understood of any Priest; as does also *Josephus* in his first Book against *Appion*; and therefore this Precept must be connected with the beginning of the Chapter, those Passages relating to the *High Priest* coming in only by the by.

(m) *Lactantius*.] in his xith Book of Institutions, c. xxiii. where also there follows: *Your Wife must be taught by your own Example to behave her self Modestly. For 'tis unjust to expect that from her, which you cannot perform your self.* You have an Expression to the same Purpose in *Gregory Nazianzene*; πᾶς ἀπατῆς, ἐν ἀντιπροσώπῳ; *How can you ask a Favour, you ne'er return one?* And *St. Jerom* to *Oceanus*, the *Laws of Cæsar* are one Thing, and the *Laws of Christ* another; *Papinianus* enjoins one Thing *St. Paul* another. *With them*, Men have all the Liberty in the World indulg'd their *Lewdness*; and *Rapes* only, and *Adultery* are censur'd, *Debauchery* in publick *Stews* with common *Wenches* is ev'ry where allow'd of, as if

where the Wife only who enjoys another Man, is charged with Adultery, and the Husband, tho' he Possesses ever so many Women, is free from the Imputation of that Crime; but the Law of God has by Marriage so equally United both Parties into one Body, that which ever of 'em shall by other Engagements disjoin and separate this closest Frame, shall be counted an Adulterer.

3. I know very well, that many are of Opinion, that in both those Points *Christ* did not make any New Law, but only re-establish'd That which God at the very Creation had given; and they think too that our Saviour's Words, which remind us of that Beginning, do very much favour this their Sentiment. But here we may answer, that from that first Condition indeed, where God gave to one Man one Woman only, it sufficiently appears what is best, and most grateful to God; and consequently what has always been excellent and commendable; but not, that it is any Crime to do otherwise; because where there is no Law, there can be no Transgression; and 'tis certain, that in those Times there was no Law about Polygamy extant. So also when God declared, whether by Adam or Moses, that the Marriage Engagement was so very considerable, that a Man should leave his Father's Family to form a New one with his Wife; 'tis the same Thing that is said to Pharaoh's Daughter, *Psal. xlv. 10. Forget thine own People and Father's House.* And though from the Injunction of so strict a Friendship, it's plain enough, that (n) 'tis very agreeable to God, that this Union

H 3

should

it was the Worth of the Person and not the Inclinations that made the Crime. But with us, what is unlawful for Women, is as much unlawful for Men. and one and the same Obligation is thought to lie equally on both.

(n) 'Tis very agreeable to God] And indeed this was a Custom which several Wise Men did formerly make their Choice, Euripides in his *Andromache* in the Person of *Hermione*, Ouse

should be *Perpetual*; yet can it not be prov'd from
hence,

Οὐδὲ γὰρ καλὸν
Δυσὶν γυναικαῖν ἀνδρὶ ἐν ἡνίας ἔχειν.
'Αλλ' εἰς μίαν βλέποντες γυναῖαν κύπειν
Στέρησιν, ὅσας μὴ κακῶς οἰκεῖν δέλει.

*'Tis by no means fair,
That one Man should lord it over two Women.
And in story, whoever has a mind to live in Quiet,
Will think one Bed-fellow enough.*

And in the Chorus.

Οὐδὲ ποτ' ἀνδρὶ δίδυμα
Λέκτρ' ἐπανήσω, &c.

*I shall ne'er commend your double Matches,
Nor like a young Brood with sev'ral Mothers,
A Family's Ruin and Distraction,
Give me the Husband who is contented
With one Wife and one Bed.*

Οὐδὲ γὰρ ἐν πόλεσι
Δίπλοχοι, &c.

*Nor is a City by a Pair of Rulers
Better govern'd than by a single Power;
'Tis overloading Subjects, and giving 'em
Opportunities for Sedition.
There's not a Poet who his Fellow bears;
The Muses love to sett 'em by the Ears.*

Προῖα δ' ὅταν φέρωσι &c.

*When a Brisk Gale fills the extended Sails,
And freshens on us, 'tis very far from Safe
To dispute the Steerage,
A Crowd of Wiser Heads don't half so well direct
As one, not near so Prudent, who has sole Command.
Let then each State it's Monarch have, each House receive
One Master only, if e'er at Peace you'd live
And Happy Days enjoy.*

Plautus in his *Mercator*:

*A Good Woman is satisfied with one Husband;
And why should not a Man be satisfied with one Wife?*

hence, that God (o) did even *then* command that this Engagement should not, upon any Account whatever, be broke and dispensed with. But 'tis *Christ* who has forbid *Man* to put *asunder*, that, which God, by that Original Institution had join'd together; taking for the worthy *subject* of a *New Law*, what was most *Eligible* in it self, and most *acceptable* to God.

4. 'Tis certain, that in former Ages most Nations had the Liberty, not only of *Divorces*, but also of marrying *several Wives*. *Tacitus* observes, that the *Germans* were almost the only *Barbarians* in his Time, who were contented with *one Wife* a-piece; and this is what we frequently meet with in the Histories as well of the *Persians* (p) as of the *Indians*. (q) Among the *Egyptians*, the *Priests* alone took up with one Wife. And among the *Greeks*, *Cecrops* was the first, as *Athenæus* testifies, who *μίας ἐνὶ ἑξέσει*, coupled one Woman with one Man; which tho' by the by, was not long observ'd even at *Athens*, as the Example of *Socrates* and others informs us. And if there were some People, who lived with greater Continency, as the *Romans* who always refrain'd from *double Marriages*, and a long while from a *Divorce*, they are indeed to be commended for it, as having come up very near to that State, which is best, and most Eligible: And the *Marriage* of a *Priest*, among these *Romans*, was never dissolv'd but by *Death*:

H 4

(r) How

(o) Did even then Command.] So *St. Ambrose*, in the Case of *several Wives*, distinguishes what God approv'd of in *Paradise*. from his condemning the Contrary, C. iv. B. i. of *Abraham*. Which Passage is set down by *Gratian*, *Caus. xxxii. quest. iv.*

(p) As of the *Indians*.] And *Ihracians*, of these you have some Verses in *Menander* and *Euripides's Andromache*.

(q) Among the *Egyptians* the *Priests* alone.] See *Herodian*, B. ii.

(r) However, it does not follow from all this that they who did otherwise, *before the Preaching of the Gospel*, were Guilty of a Crime in so doing.

X. By the Law of Nature only, Marriages are not void for want of the Consent of Parents.

X. 1. Let us now inquire, what *Marriages* are ratified by the *Law of Nature*; to form a right Judgment in which Affair we should remember, that *not all Things which are contrary to the Law of Nature, are by the Law of Nature null and void*, as is evident in the Case of a *Prodigal Deed of Gift*; but only those Things which want the *Principle* that makes an Act *valid*, or of which the Performance is *always* attended with some Crime and Defect or other. Now the *Principle* of Right, both here and in other Human Acts, is that *Right*, which we interpreted a *Moral Faculty*, join'd with a *sufficient Will*. What *Will* is *sufficient* to constitute a *Right*, will be better inquired into, when we come to treat of *Promises* in General. As to the *Moral Faculty*, there starts a Question about the *Consent of Parents*, whether that, as some People contend for, is *Essential* to the *Validity* of a *Marriage*; but they quite mistake the Matter, for all the Arguments they bring for it, prove no more than that it is becoming the Duty of Children to ask their Parent's Consent; which we readily grant too, with this *Proviso*, that the Inclinations of the Father and Mother are not visibly unjust. For if *Children* owe their *Parents* a *Respect* in all Things, certainly then ought they more particularly to pay it in an Affair, such as *Marriage* is, that concerns the whole Family. But from hence it's far from following, that the Son therefore has none of that *Right*, which we explain'd by the Word *Faculty* or

(r) However it does not follow &c.] St. *Austin*, B. xxii. c. xlvii. against *Eusebius* when 'twas the Fashion, 'twas no Crime. *Gratian*, but under the Name of St. *Ambrose*, has made use of the same Expression.

or *Power*. For when a Man *Marries*, he is suppos'd to be of a Competent Age, and Years of Discretion, and to *leave* the Family, so that he is no longer subject to the Rules and Government of it. But the bare Duty of a *Respect to be paid*, does not render the Act, that's *Repugnant* to it, *void*.

2. But that the *Romans* and others injoin'd some *Marriages* to be *void*, where the Father's *Consent* was *wanting*, did not proceed from the *Law of Nature*, but the mere *Will* of the *Legislators*. For by the same Law (s) the *Mother*, to whom however the Children do naturally owe a *Respect* and *Veneration*, does not, by her *not consenting*, disannul the *Marriage*; nor even the *Father*, if the *Son* was formally *freed* from his *Tuition*; and if the *Father* himself be under the *Power* of his *Father*, then both *Grand-father* and *Father* must yield their *Consents* to the *Son's Marriage*; but for a *Daughter*, the Authority of the *Grand-father* alone is sufficient; which *Distinctions* being utterly unknown to the *Law of Nature*, are *Demonstration* enough, that 'tis the *Civil Law* has introduced 'em.

3. We find indeed in the *Scriptures* several *Religious Men*, but a far greater number of *Women* (to (t) whose *Modesty* 'twas most agreeable in an *Affair* of

(s) *The Mother, to whom however the Children do naturally owe &c.*] Nay, even the *Grand father's Consent*, if a *Freeman*, has a greater *Regard* paid to it, than that of the *Father* who's a *Slave*. *Gratian* *Caus. xxxii. quest. iii.*

(t) *To whose Modesty 'twas most agreeable in an Affair of this kind to be determin'd by the Judgment of others.*] 'Tis not consistent with the *modesty* of a *Virgin* to chuse her self an *Husband*, says *St. Ambrose*, *B. i. of Abraham*, the last *Chap.* cited in *Gratian*, *Caus. xxxii. quest. ii.* *Donatus* upon *Andria*; the *Chief Power* of *Marriage* is in the *Girl's Father*. *Hermione* in *Euripides*.

of this kind to be determin'd by the Judgment of others; pertinent to this, is what we read in the *first Epistle to the Corinthians* of the *disposing of a Virgin*) in contracting Marriages wholly directed and advis'd by their *Parents*; but yet neither is *Esau's Marriage* pronounced *void*, nor his Children declared *Illegitimate*, for being married without such Consent and Direction. *Quintilian*, with a regard to what is strictly and naturally right, expresses himself thus, *If it be allowable for a Son to do sometimes, even against the Father's Will, what would otherwise deserve no Blame at all, (u) certainly that Liberty is never more necessarily indulg'd than in Matrimony.*

XI. By the Evangelical Law, Marriages with another Woman's Husband or another Man's Wife, are null and void.

XI. A Marriage, no doubt of it, contracted with a Woman, who has already an *Husband*, is *void* by the *Law of Nature*, unless her Husband has first solemnly parted with her; for till then his Property in her continues; but by the *Christi-*
an

Νυμφευμάτων ὃ ὅτι ἐμῶν πατὴρ ἐμὸς
Μέλειναν ἔχει, καὶ ἐκ ἐμὸν κείναι τὰδε.

*My Father will take care to dispose of me,
I have no Business to determine
In such Affairs my self.*

And Here in *Musaeus*:

Ἀποδοὺν εἰ δυνατόμεθα γάμοις ὁίοισι πελάσαι,
Οὐ γὰρ ἐμοῖς τοκέων ἐπέαδεν.

*We ne'er shall to that Happy State arrive
Of Marriage; since our Parents are against the Match.*

(u) Certainly that Liberty is never more necessarily indulg'd than in Matrimony.] *Engraphius* upon *Terence's Andria*. Act. 1. Scen. v. He touches upon this, whether Children should strictly obey their Father's Commands. For 'tis certain, that in the case of Marriage ev'ry Son is at Liberty to chuse for himself. *Cassiodore*. vii. 4. 'Tis an hard Thing, that in Matrimony, to which we are to owe our Posterity, we should be deny'd the entire Freedom of Choice.

an Law, till Death breaks off the Engagement. And such a Marriage is therefore *void*, as well because the *Moral Faculty*, which was remov'd by the former Marriage, no longer remains in Force, as because ev'ry Effect of it is Criminal and Faulty, all the Acts of the second Marriage being the continual Invasion of that which belongs to another. So on the other Hand a Marriage contracted with him, who has a *Wife* already, is *void*, by Reason of that *Right* which Christ has allow'd the virtuous Woman over her *Husband*.

XII. 1. The Question about the *Marriages* of those who by *Blood* or *Affinity* are related, is a nice and perplexing Point, and which has frequently been managed *Pro* and *Con*, with no little Heat and Commotion. For whoever attempts to assign positive and natural Reasons, why such Marriages are so unwarrantable as to be forbid by Law or Custom, will by Experience find it a Task not only Difficult but Impracticable. For as to that Reason which (x) *Plutarch* in his *Roman Questions* offers, and *St. Austin* after him in his *City of God*, B. xv. c. 16. of *inlarging the Number of ones Friends and Acquaintance*, by *inlarging ones Kindred*, is not of so much Weight and Consideration as to make one believe that whatever is not done with

XII. By the Law of Nature the Marriages of Parents with their Children are unwarrantable and void.

(x) *Plutarch in his Roman Questions offers.*] *Philo* in his *special Laws*; τί ὅ τὰς πρὸς τὰς ἄλλας, &c. Why should Conversation and Alliances with other People be restrain'd? Why should we confine so great and so glorious an Affair to the narrow Compass of one Family, an Affair that would enlarge and spread it self with Advantage over Continents and Islands, and the whole World? For the Intermarriages of Foreigners create new Relations no ways Inferior to those of Blood, and 'tis indeed for the sake of these that he has prohibited other Matches. *St. Chrysostom*, upon 1 Cor. xiii. 13. τὶ σενοχρηεῖς, &c. Why do you cramp an extensive Love? Why do you thus superfluously destroy the Foundation of Friendship, whereas, if you would marry a Wife from Abroad, you might have more Opportunities of gaining Friends?

with that view, should be *Void* and *Criminal*. Nor does it follow, that because 'tis not so *advantageous*, it must therefore be *unlawful*. Add to this, that it may possibly so happen, that some greater Advantage, however great this may be, may interfere with and oppose it, and this too, not *only* in the *Case* which God in the Jewish Law has excepted, when a *Man dies without Issue*; a Circumstance not much unlike to which is that which is injoin'd by the *Hebrew* (y) and *Attic* Law concerning *Virgins*, who are *Sole-Heiresses* (call'd by them ἐπίκλησις, *Universal Inheritors*) to keep the Estate of their Ancestors still in the Family, but also in many other Cases that we frequently meet with or may Imagine our selves.

2. But from this general Liberty I would have the *Marriages* of *Fathers* and *Mothers* with their *Children* of any *Degree* or *Remove*, always exempted; the Reason why such Marriages are unlawful, being, if I am not mistaken, sufficiently evident. For neither can the Husband, who by the *Law* of *Marriage*, is the *Superior*, pay to his *Mother* (if his *Spouse*) that Respect which *Nature* requires: Nor a *Daughter* to her *Father*, because tho' she be his *Inferior* even in *Marriage*; yet *Marriage* introduces such a *Familiarity*, as quite excludes the *Respect* of that other *Relation*. Very well then has *Paulus* the Civilian, when he had said before, that in *Contracting Marriages*, (z) we ought

(y) *And Attic Law*] See *Demosthenes* to *Leocrates*: *Fortunatianus* the *Rhetorician*: *Donatus* upon *Phormio*, *Act.* 1. *Scen.* 1. and upon the *Adelph.* 4. 5.

(z) *We ought to consult the Right of Nature, and the Decency of the thing*] *Philo* in his *special Laws* handles this matter very elegantly. where he calls it μέγιστον ἀνοσιέργημα, *A very great Wickedness*, παρὰ τὴν ἐνὸν τελευτηκὸν &c. *To stain a Deceased Father's*

ought to consult the Right of Nature, and the Decency of the thing, subjoin'd, that it was a Breach of that Decency to marry ones own Daughter. Such Marriages therefore, there's no room to doubt, are unwarrantable, and *Ipso Facto* void, because the Effect of 'em is attended with a perpetual Crime.

3. Nor ought we to be any ways influenced by *Diogenes's* and *Crysippus's* Argument, which they fetch from Cocks and other Brute Creatures, to prove that such Mixtures are not against Nature. For as we said, in the beginning of the Book, 'tis enough to constitute a thing unwarrantable, if it be repugnant to *Human Nature*. And such is that *Incest* which *Paulus* the Lawyer has written, was, (a) by the Law of Nations, committed between People within the Degrees of the direct Line, Ascendent and Descendent. This is that natural Right, which as *Xenophon* says, is no less a Right, because (b) the *Persians* despis'd it. For that is justly

Father's Bed, which ought, as a thing Sacred, to be kept untouch'd; and without any regard to the Reverence that's due to Age, and a Parent's Character, to become both her Son and her Husband, and she to be both his Mother and his Wife.

(a) By the Law of Nations.] So says *Papinian* too, in *L. Si Adulterium. §. 2. D. ad legem Juliam de Adulteriis.*

(b) The *Persians* despis'd it.] Which Crime of theirs *Philo* observes was punish'd by God with perpetual War, and one Brother's frequently murdering another. *St. Jerome* in his B. 2. against *Jovinian* adds to the *Persians*, the *Medes* and *Indians* and *Ethiopians*. Of the Barbarians in general, *Hermione* in *Euripides's Andromache*,

Τοῦτον πᾶν τὸ βάρβαρον &c.

To such an Original

Do all the Barb'rous Race their Being owe.
 Father with Daughter joins, and Son with Mother,
 The Sister to Guilty Pleasures takes her Brother;
 In mutual Blood the nearest dearest Friends
 Their Hands imbrue; nor does the Law forbid it.

justly term'd *Natural*, which, as *Michael Ephesius* explains it in his *Nicomachia*, is, τὸ παρὰ τοῖς πλείοις καὶ ἀδυσχεροῦσι καὶ μετὰ φύσιν ἔχουσιν, *practis'd by the generality of such People as are unperverted, and live according to Nature.* *Hippodamus* the *Pythagorean*, calls 'em, παρὰ φύσιν ἀμέτρος ἐπιθυμίας, ἀκαταχέτους ὀρμᾶς, ἀνοσιώλατος ἡδονᾶς, *unnatural and immoderate Lusts, unbridled Passions, most impious Pleasures.* Thus *Lucan* of the *Parthians*.

*With wanton Meats and Wine debauch'd and mad
The Court pursue their Vices, nor startle
T'ingage in ev'ry Scene of Lust, howe'er forbid
By Laws or Nature.*

And presently after,

*If to enjoy a Mother be thought no Crime,
What else can be one?*

But *Dion Prusæensis* very judiciously ascribes this Custom of the *Persians*, in particular, to their *Ill Education*.

4. And here one would be amaz'd at *Socrates's* Fancy in *Xenophon*, who in such sort of Marriages can find nothing amiss but the Inequality of Years; from whence, says he, will ensue *Barrenness*, or the *Children* will be *deform'd*. But if this were the only Objection to such a Marriage, 'twould certainly be neither *null*, nor *unlawful*, no more than between other Persons, whose Ages are often as disproportionate, as that of a *Father* and *Mother* is usually in respect of their *Children*.

5. But to dwell no longer upon this, let us rather inquire, whether, besides that which we said might be conceiv'd by the *Light of Reason*, there be not in Men, whom a bad Education has not *spoil'd*, a certain *Aversion* grafted in their very *Tempers*,

Temper, something *shocking*, and that makes Nature recoil at the Thoughts of mingling with their Parents, or their own Progeny, since even several dumb Creatures abhor it. For many have been of this Opinion; and *Arnobius* in his 5th Book against the Gentiles, *What! Could Jupiter entertain the impious Hope of debauching his own Mother; nor could he be diverted from the Heat of his detestable Passion by that Horror, which Nature and an universal inborn Sense has impress'd, not only on Men, but on several Beasts?* There's a notable Story upon this Subject, in *Aristotle's* 9th History of Animals, c. 49. of a Camel and a Scythian (c) Horse; and another not unlike it in *Oppianus*, of Hunting, B. 1. And *Seneca* in his *Hippolytus*;

*The very Beasts avoid unlawful Love,
And without knowing what Relation is,
Or Rules of Decency, by Instinct keep
Within the Just Bounds of both, and only
With Stranger-Brutes engage.*

XIII. 1. The next Question is about all the Degrees of Affinity, and the Degrees of Consanguinity in the Collateral Line, those especially which are particularly mention'd in the xviiiith of *Leviticus*. For granting, that these Prohibitions are not deriv'd from the mere Law of Nature, yet do they plainly appear to have their Sanction from an express

XIII. The Marriages of Brothers with Sisters, of a Mother-in-Law, with her Son-in-Law, of a Father-in-Law with his Daughter-in-Law, and

(c) Horse.] *Pliny* in the 8. 42. of his Natural History, where he treats of Horses; Another, when what had Hood-wink'd him was taken off, and he found that it was his Mother that he had leap'd, run directly to a Precipice. (and there drop'd down dead. And upon the same account we find a Fellow, who look'd after a Mare, and was to provide her a Stallion, torn to pieces in a Field near Rieti. For these Creatures too have a sense of Relations. You have several such Instances in *Varro*, de Re Rustica 2, 7. and in *Aristotle* in a Book on that Subject.

such other Matches as these, are unwarrantable and void by the positive Law of God.

press Order of the *Divine Will*: Nor is this such an Order as obliges the *Jews* only, but all *Mankind*, as seems to be very fairly collected from those words of God to *Moses*, *Defile not your selves in any of these things; for in all these the Nations are defil'd, which I cast out before you.* Again, *You shall not commit any of these Abominations: For all these Abominations have the Men of the Land done which were before you, and the Land is defil'd.*

2. For if the *Canaanites* and the People about 'em offended by such Actions, of Consequence there was some Law before against those Actions, which Law not being purely *natural*, must needs have been given by God, either to *them* in particular (which indeed is not very likely, nor do the words import so much) or to all *Mankind*; either at the *Creation*, or after the *Flood*. But now such Laws as were injoin'd all *Mankind*, seem no ways abolish'd by *Christ*, but only those, which, like an *Intrenchment*, separated the *Jews* from all other People. To which we may add, that *St. Paul* does in very severe Terms express his *Abhorrence* of the Match of the *Son-in-Law* with his *Father's Wife*; tho' there's no Command of *Christ* relating to that Affair; nor does he himself urge any other Reason, than that (d) such a Mixture was even by profane Nations reckon'd *Impure*, 'twas a *Fornication not so much as nam'd amongst the Gentiles*. The Truth of which Assertion, among several other Proofs, appears from *Charondas's* Laws, who put a Mark of *Infamy* upon such a Marriage; and from that Passage in *Lysias's* Oration, *οὐκ ἔστιν ὁ νόμος*

1 Cor. v. 1.

(d) Such a Mixture was, even by profane Nations, reckon'd *Impure*.] *Tertullian* 5. against *Marcion*. I don't insist upon it, that by the Law of our Creator, he who Married his Father's Wife offended, let him only observe the Discipline and Usage of Common and Universal Religion.

πάντων σχεδινώτατος ἀνθρώπων τῇ μητρὶ καὶ τῇ θυγατρὶ, *That Wretch, the most villainous Fellow in the World, liv'd, as Man and Wife, with the Mother and her Daughter.* And that of Cicero, in a Case not unlike this, is not foreign to the matter in Hand: For when he had declar'd how the Mother-in-Law had married her Son-in-Law, he subjoins, *Oh, the incredible Wickedness of the Woman, a Wickedness that no other was ever known to be guilty of!* When King Seleucus would fain have given his Wife Stratonice to his Son Antiochus, he was afraid, (e) as Plutarch relates it, lest she should be offended, τῷ μὴ νενομισμένῳ, *with a thing that the Laws never allow'd of.* And in Virgil we have,

Thalamus ausum incestare Novercæ,

Who stain'd his Stepdame's Bed with impious Lust.
Dryden.

Which common Notion, if not deriv'd from a real Dictate of Nature, must needs proceed from an Ancient Tradition founded upon some express Command of God.

3. The Ancient Hebrews, who in this matter are no contemptible Expositors of the Divine Law, and especially Moses Maimonides, who has read, and with great Judgment digested all their Writings, say, that there are two Reasons assignable for those Laws mention'd in the xviiith Chap. of Leviticus, about Marriages: The First, a certain natural Modesty, which will not suffer Parents to mingle with their Issue, either in their own Persons,

VOL II.

I

sons,

(e) As Plutarch relates it.] In his Life of Demetrius: And Apian too in his Accounts of Syria; who calls it ἀβυσσὶς πάθος, an unlawfulness of Passion.

sons, or (f) the Persons of them who by *Blood*, or by *Marriage-Consanguinity* are nearly related : And the *second*, lest that People, always living together, with an unobserv'd and uninterrupted Liberty, should be encourag'd to Wantonness and Adultery, if there was any Prospect that these sorts of *Intrigues* might be *made up* by *Marriage*. Now, if we would judiciously apply these *two Reasons* to those which in *Leviticus* are call'd *Divine Laws*, 'twill easily appear, that the *first Reason*, as being deriv'd from what if Nature does not positively command, she at least advises us to, as the more decent Choice, is in full force, as well among them who are *Related* in the *direct Line* (to say nothing now of *Parents* and *Children*, whom, in my Opinion, even *Natural Reason*, without any *express Command*, does sufficiently forbid to marry with one another) (g) as also among them, who are *Related* in the *first Degree* of the *Collateral Line*, which because of its immediate Descent from the common Stock, and of that very late Impression of the *Father's* and *Mother's* Image on their *Children*, is usually call'd the *second Degree*. Many such Observations as these furnish most of the matter for *Divine* and *Human Laws*.

4. And therefore the *Jews* are, by an evident Parity of Reason, for comprehending in the *direct Line*, even those *Relations* that are not expressly mention'd in the Law. The *Names* of which *Relations* with them are these, the *Mother's Mother*, the *Father's Mother's Mother*, the *Father's Mother*,

(f) Or the Persons of them, who by Blood, or by Marriage-Consanguinity, are nearly related.] Philo ἀδελφὰ ὅ &c. Tho' the parts be divided, the Fraternal Relation remains whole and entire, and they are still united in Nature and Consanguinity.

(g) As also among them, who are related in the first Degree of the Collateral Line.] And thus far the People even of Peru and Mexico abstain'd from Marrying with Relations.

nothing of it in its proper place, because 'twas enough that he had tacitly signify'd it in the *Law* it self, by condemning Foreign Nations upon that very account; for there are several things in the *Law*, which are not taken notice of in order of Time, but as Occasion requires: From whence arises that celebrated Maxim among the *Jews*, that *in the Law there is no such thing as afore or after*, that is, many things are set down there as done last, which were indeed transacted first.

6. *Michael Ephesus*, at the 5th of his *Nicomachia*, has these words, concerning the Marriage of Brothers and Sisters, τὸ ἀδελφὸν μίγνυαδ τῇ ἀδελφῇ &c. For a Brother to lye with a Sister, was at the beginning indeed a thing altogether indifferent; but now there being an establish'd *Law* against such Conversations, 'tis far from being indifferent. *Diodorus Siculus* calls the forbidding of Brothers and Sisters matching, κοινὸν ἔθος τῶν ἀνθρώπων, the common Custom of all Men; from which Custom however he excepts the *Egyptians*; and *Dion Prusaensis* all *Barbarians*. *Seneca* has written, *We marry the Gods too, but very indecently, because we put Brothers and Sisters together*. *Plato* in his 8th Book *de Legibus*, calls such Matches μὴδ' αὐτῷ ὅσια καὶ θεομίση, *Unholy and detested by God*.

7. All which evidently proves, that 'twas the Ancient Opinion that the *Law of God* was against such sorts of Marriages, and therefore we find that they never speak of 'em but in Terms expressive of the Crime and Impiety of 'em. And that all Brothers and Sisters are included here (i) is plain from the *Law* it self, which always comprehends the Relations of that Degree as well by the Father's

23

(i) Is plain from the *Law* it self.] Where see the *Chaldee Paraphrast*; the *Spartans* and *Athenians* made very ill Distinctions in this Matter, and indeed very various ones too.

as the *Mother's* side, and those whether *Born* and *Educated* at *Home* or *Abroad*.

XIV. 1. Which clear and particular Recital seems to shew the Difference between these and more distant Relations: For example, to marry an *Aunt* by the *Father's* side is forbidden; but (k) to marry a *Brother's Daughter*, where there's the *same Degree* of Blood, is not forbidden; nay, there are several Instances of this kind among the *Jews*. To marry *Nieces* is to us entirely *New*; but very usual with other People, nor is it by any Law prohibited, says *Tacitus*. *Isæus*, and *Plutarch* in the Life of *Lyfias*, observe, that it was allowed of at *Athens*. The Reason that the *Hebrews* allege for it is this, that young Men often frequent their *Grand-fathers* and *Grand-mothers* Houses, or even live there with their *Aunts*; but they much seldomer go to their *Brothers*, nor have they so much Freedom and Right in their Families. Now if we grant all this, as indeed 'tis Consonant enough to Reason, we must acknowledge, that the Law of not marrying Relations in the direct Lines as well as *Sisters* since the World is sufficiently peopled, is perpetual, and universal too; as being founded upon *Natural Decency*, in so much that whatever is done contrary to this Law, is, on the Account of that Moral Viciousness, that attends it, *Ipso Facto*, null and void; but what is done contrary to the rest of the Laws is not, because they contain rather some *Precaution* or other, which *Precaution* may be provided for some other way.

I 3

2. And

XIV. Marriages with Relations of a more Distant Degree, do not seem so unwarrantable.

(k) To marry a *Brother's Daughter*.] *Josephus* thinks that *Sarah* was so to *Abraham*. The same Author gives us Precedents in this Kind, after the Law, in *Herod* who had married his *Niece*, and who had engag'd his own *Daughter* to his Brother *Pherotas*. See *Ant. Hist.* xii and xvi. *Andromede* was promis'd to her Uncle *Phineus*, *Ovid. Metamorp.* v. This was afterwards prohibited by the *Romans* but permitted by *Claudius*. Forbidden by *Nerva*, allow'd by *Heraclius*.

2. And by the *Ancient Canons*, which are call'd *Apostolical*, he who had married *two Sisters* one after another, or his *Niece*, that is, his *Brother's* or *Sister's Daughter*, was only incapacitated for the *Ministerial Office*. Nor is there any Difficulty in answering what we said of the *Sin* imputed to the *Canaanites*, and the People *about* 'em. For all the whole Discourse there may be reduced to some Principal Heads of that Chapter, as to *Lying with Mankind as with Womankind*, with *Beasts*, with *Father or Mother*, with *Sisters*, with *other Men's Wives*, for the *Security* of which, or as the *Hebrews* speak, the *Fortification* of it, the rest of the *Laws* were added. The Prohibition against marrying *two Sisters* at once, may be a very just Argument for not understanding of ev'ry *Particular Thing* in that Chapter, what is spoken in general Terms; for *Jacob's* Character and Piety, who himself acted contrary to this Prohibition, will not suffer us to believe, that it was formerly laid upon all *Mankind*. To which we may add, what *Amram*, *Moses's* Father, did; for he, before the Law, married his *Aunt by the Father's side*; as *Diomedes* and *Iphidamas* (1) amongst the *Greeks* married their *Aunts by the Mother's side*; and *Alcinous*, his *Brother's Daughter Arete*.

3. But yet the *Primitive Christians* were very much in the right of it, who *voluntarily* observed not only those *Laws* which were given in *common* to all Men, but those which were peculiarly design'd for the *Hebrew People*: nay, and extended the Bounds of their *Modesty* even to some farther Degrees of Relation, that in this *Virtue* too, as well as in all others, they might excel the *Jews*. And that this was done with an universal Consent appears

(1) Amongst the *Greeks*.] And we learn from *Euripides's Iphædra* that *Electra* was married to her Uncle *Castor*.

appears from the *Canons*. St. *Austin* speaking (m) of *Cousin-Germans* marrying among *Christians*; *Good Manners*, says he, *seldom let us practise what the Laws allow us; because though the Law of God has not forbid it, nor the Law of Man is yet against it; we dread however a warrantable Action for its Nearness to and Resemblance of, what is unwarrantable*. This Wariness and Circumspection has been follow'd by the *Laws of several Princes and States*; thus (n) *Theodosius's* Institution forbids *Cousin-Germans* to marry, and is highly commended for it by St. *Ambrose*, as an Act of great Goodness and Piety.

4. But we must at the same Time observe, that (o) what an *Human Law* forbids to be done, when done, is not therefore *invalid*, unless the Law adds

I 4

this

(m) Of *Cousin-Germans*.] *Æschylus* in his *Danaides* calls such Marriages. *ἀνεγὼν ἐν δέμῳ ἐργεῖα*, unlawful Beds, and he says, that by this Means *υπαίνασθαι γένος* the Family is corrupted and spoil'd. But the *Scholiast* subjoins, that such Marriages were Illegal, because the Maid's Father was still living, as if when he were dead, they would be by the Law *τῆς ἐπικλήρων*, of Sole Heiresses, Just and Warrantable. In the Speech of *Sp. Ligustinus*, a Roman Citizen mention'd by *Livy*, you have, *My Father married me to his Brother's Daughter*. See too *Plautus's Pœnulus*.

(n) *Theodosius's* Institution.] *Victor* of him, setting so great a value on Modesty and Continence, that he prohibited *Cousins* marrying as well as *Sisters*. *Libanius* too mentions this in his Oration de *Angariis*. There's a Law of *Arcadius* and *Honorius* to the same Purpose; 'tis the third in the *Theodosian Code de Incestis Nuptiis*. But that, however, such Matches us'd, by a particular Licence from their Priest, to be allow'd of, is shown in another Law of *Honorius* and *Theodosius* the Younger, in the same Code; under the Title, *si Nuptia ex rescripto petantur*. This was observ'd by the *Gothic Kings*; *Cassiodore*, vii. 46. *Prudent Men* following this Example, did transmit a very modest Custom to their Posterity, reserving to their Prince only, the great Privilege of giving *Cousins* leave to marry. Where you have also the Form of a Licence so obtain'd from the Prince.

(o) What an *Human Law* forbids to be done, when done, is not therefore Invalid.]

this Clause too, and expressly declares it void. By the LXth Canon of the Council of *Elvira*, if any Man after the Decease of his Wife (p) marries her Sister, and she proves faithful, he is only excluded from the *Sacrament* five Years; which evidently proves, that the *Marriage-Engagement* still stands Good. And as we just now said, by the *Canons* call'd *Apostolical*, he who married two Sisters or his Brother's Daughter, was only render'd incapable of *Orders*.

XV. There may be some very warrantable Matches which yet may be term'd by the Laws Concubinage or Whoredom.

XV. 1. But to go on to other Matters, and here we must observe, that there's a sort of *Concubinage*, which is indeed a Real and Authentick *Marriage*, tho' it may not have some of those *Advantages* that are peculiar to the *Civil Right*, or perhaps may lose some of its *Natural Effects* by an *Obstruction* from the *Civil Law*. Thus for Instance, when a Man and Woman Slave among the Romans had Carnal Familiarity together; this was call'd *Contubernium*, Cohabitation, not *Matrimony*, tho' in such a *Familiarity* there's nothing, *Essential* to a *Marriage*, wanting; and therefore in the Ancient *Canons* it was expressly term'd, γάμος, *Marriage*. So an intimate and constant Conversation between a
Free-

Invalid.] In the Council of *Agatha*, after mentioning such Marriages as are prohibited, and amongst the rest of a Brother's Widow, 'tis added, *Which for the present we do so prohibit, as not to dissolve those Matches which are already made.* Gratian has inserted this in his II and III Question, Case 35. Something like it too is put by Paulus into his Sentences; B. iv. Tit. xx. *Marriages contracted without Consent of Parents are Illegal, but however not to be dissolv'd; unless perhaps Arrian subjoin'd these last Words.* Tertullian treating of marrying with an Unbeliever, in his second Book, address'd to his Wife, says, that the Lord enjoins rather that such a Match should not be contracted, than that it should be dissolv'd. See below, Sect. XVI.

(p) *Marries her Sister.*] The Lombard Law, B. ii. c. viii. 13. because the Canons direct the same concerning two Sisters as two Brothers,

Freeman and a Slave, is call'd (q) not Wedlock, but Concubinage; which Denomination, by a kind of likeness in Circumstances, was afterwards made use of to signifie that State between other Persons of unequal Condition; as at Athens between a Citizen and a Forreigner; from whence, upon that Passage of Virgil,

Suppositas de Matre Nothos furata creavit.

A Pair of Coursers ———

*Whom Circe stole from her celestial Sire :
By substituting Mares produced on Earth,
Whose Wombs conceiv'd a more than Mortal Birth.*
Dryden.

Servius expounds the Word *Nothos*, of mean and obscure Extraction by the Mother's side. In *Aristophanes's* Play, call'd *The Birds*, the Person who had said, *νόθος εἰ καὶ γνήσιος*, *You are a Bastard and not Lawfully-begotten*, proves his Assertion by *ἐκ γὰρ ξένης γυναικὸς*, *you are the Son of a Foreign Woman*. And in *Ælian* *γνήσιος*, *Legitimate*, is defin'd, *ὅς ἐκ ἀμφοῖν γέγονεν ἀσόν*, *He who is born of both Father and Mother that are Citizens*.

2. Now as in a State of Nature there might be a Real and Authentick Marriage between such Persons

(q) Not Wedlock.] But yet in Greece, Carthage and *Apulia*, the Cohabiting of Slaves was term'd Marriage. The Prologue to *Plautus's Casina*. So also in the Laws of the Lombards, B. ii. Tit. xii. 10. and xiii. 3. and in the *Salique* Law, Tit. xiv. §. ii. But such Weddings were of no Force among the Hebrews without the Consent of their Masters, as is remark'd by themselves on *Exod. xxi*. Where there's an Account of such Matches; nor among the Christian Greeks, as is observ'd by *St. Basil* in his *Canons*. And we find in *Cassiodore* vii. 40. that it was usual to ask the Prince's Leave for marrying a Woman of Unequal Condition and Circumstances.

Persons as we have been speaking of, if the *Woman* was under the *Husband's* Protection and had promised him *Fidelity*. So also (r) in a State of *Christianity*, that of a *Man* and *Woman* Servant, or of a *Freeman* and a *Slave* will be a true *Marriage*; and much more that of a *Citizen* and a *Foreigner*, of a *Senator* and a *Free-Woman*, provided that there is, besides, what the *Divine Christian Law* requires, viz. such an *Union of one Man with one Woman as can never be dissolv'd*, this, I say, will be a true *Marriage*, though some *Advantages* of the *Civil Law* do not accompany it, or, if they would of themselves, are hinder'd by this *Law*. And 'tis in this *Sense*, that we must take these words of the first *Council of Toledo*: *As for him who has no Wife, but (s) a Concubine instead of a Wife, let him not be refus'd the Communion; provided however that he contented with this one Woman, whether Wife or Concubine, as he pleases. To which you may add*

(r) *In a State of Christianity.*] Look in *Gratian's Collection*, c. i. de *Conjugiis Servorum*.

(s) *A Concubine instead of a Wife.*] Of such a Concubine *St. Austin* de *Fide & Operibus*, 'Tis a doubt worth examining into, whether a Concubine ought not to be admitted to *Baptism*, if she shall declare and profess, that she will never know any other *Man*, though he to whom she is at present subject, should at any time put her off. And in his fifth Book, de *Bono Conjugii*, 'Tis often also an *Inquiry*, when a *Man* and a *Woman*, be no one's *Husband*, nor she any one's *Wife*. *Cohabit*, not in Order to get *Children*, but only through *Incontinency* on the mere Account of lying together, having first solemnly engag'd never to do so with any other, whether this may not be called a *Marriage*. And perhaps it may, without an *Absurdity* be term'd *Wedlock*, if they both agree that this State shall Last till one of their Deaths; and though it was not the *Motive* of their coming together, yet if they do not purposely avoid having *Issue*, either by being unwilling to have any, or by some wicked Method or other contriving to hinder their *Conception* and *Birth*. And therefore in the *Capitul. Francic. vii. c. 155*. 'tis said: He who has a *Wife* may not at the same time keep a *Concubine*, lest the *Love* of his *Mistress* take him off from his own *Spouse*.

add a Passage in *St. Clement's Institutions*, B. viii. c. xxxii. And to our present Purpose is it, that *Theodosius* and *Valentinian* call some sort of *Concubinage* an *Unequal Marriage*, and that from thence 'tis said a *Charge of Adultery* may also arise.

XVI. 1. But besides; though a *Human Law* prohibits the contracting of *Marriages* between some particular Persons, it will not therefore follow that such a Marriage, if it be already actually contracted, is void. For to *Forbid*, and to *Invalidate*, are quite different Things; the *Authority* of a *Prohibition* consisting altogether in its *Penalty*, which *Penalty* is either *Express* and *Positive*, or *Discretionary* and *at Will*; and this sort of Laws (t) which forbid the doing of a Thing, but don't disannul it when done, *Ulpian* calls *Imperfect*. Such was the *Cincian Law*, which forbade to give above so much, but did not make void the Gift it self.

XVI. Some Marriages not allow'd to be contracted, may yet, when contracted, stand Good in Law.

2. We

(t) Which forbid the doing of a thing, but don't disannul it when done.] *Livy* B. x. The *Valerian Law*, when it prohibited that any Man should be whip'd or beheaded. for making his Appeal to the People, did in case of any Violation of this Order provide no Manner of Penalty, but only declared it very ill done of 'em; presuming, I suppose, (such was the Modesty of Mankind in those Times) that a bare Prohibition was a sufficient Obligation and Restraint on Folks, to observe what was injoin'd 'em. Whereas now a-days a Man would scarce threaten his Slave in so slight a manner. The *Furian Law* about Wills, as *Ulpian* relates it, did prohibit any Body, excepting such and such particular Persons, to receive by way of *Legacy*, or on the Account of any one's Death, above a thousand *Asses*, and on him, who took more, impos'd the Penalty and Forfeiture of Four Times the value of the Sum so Received. *Macrobius* near the Conclusion of what he has written upon *Scipio's Dream*; In Laws, that is called *Imperfect*, which lays no Penalty on them who deviate from it. See above, in this Chapter at the End of §. xiv. So *Div. Marcus* gave it as his Opinion; that the Heir, who forbids him to have the Direction and Care of his Funeral, whom the Testator himself has made Choice of for that Purpose, is mightily in the Wrong of it; but however that there is no Penalty lying against him.

2. We know indeed that it was afterwards enacted by *Thodofius*, that in case a Law only prohibited a Thing, and did not precisely add, that whatever was done contrary to that Law should be null and void, yet if the Affair came to be debated in Court, whatever was done should be declared, to all intents and purposes, as null and void, as if it never had been done. But this *Extent* was not from the Force of the Prohibition alone, but by virtue of a new Law, which other People were no ways oblig'd to observe. For the *Irregularity* is oftentimes more in the *Act* than its *Consequences*, and (u) the Inconveniences that follow the *Rescission*, are frequently greater than the *Indecency* or *Inconvenience* of the *Act* it self.

XVII. The
Right and
Authority
in all sorts
of Societies,
is in the Ma-
jority.

XVII. Besides this most Natural *Fellowship* of Man and Wife, there are several other *Associations*, both publick and private; and these too either over a People, or of a People among themselves. But all 'em have this in common to 'em, that in Matters for which the *Association* it self was Instituted, the whole Body or the major Part in the Name of the whole Body, oblige all and ev'ry the Particular Members of the Society. For 'tis highly to be presum'd, that those who enter into a Society are willing, that there should be some Method fix'd of dispatching Business; but 'tis altogether Unreasonable, that a greater Number should be govern'd by a Less, and therefore, (x) though there

(u) *The Inconveniences that follow the Rescission, are frequently greater than the Indecency, &c.*] And therefore King Alcinous was for having Medea given back to her Father, provided she was still a Maid. This is mention'd by Apollonius in his *Argonauta*, and by the Scholiast there, and by Apollodorus in his *Bibliotheca*.

(x) *Tho' there were no Articles agreed on, or Laws.*] Such as are for having both Parties come into the same Measures; as c. 6. *de Electione*.

there were no Articles agreed on, or Laws that express'd the precise Form of managing Affairs, the Majority would Naturally have the Right and Authority of the whole. *Thucydides* says, κύριον εἶ) ὁ, τι ἂν τὸ πλεόν & ψηφίση), what the Majority Vote, must stand Good. *Appian*, ἐσι δ' ἐν τε χειροτονιαῖς καὶ δίκαις αἰ τὸ πλεόν δικαιότερον, in Elections and Courts of Judicature, the Stronger is the Juster side. So *Dionysius Halicarnassensis*; ὁ, τι ἂν δόξη τοῖς πλείοσι τῆτο νικᾶν, (y) What the Major Part approve of, must prevail. And in another Place; ὁ, τι δ' ἂν οἱ πλείους ψῆφοι καθαιρῶσι τῆτο ποιῆν, What the Plurality of Voices will repeal we must submit to. And again, ὁ, τι ἂν αἱ πλείους γνώμαι καθαιρῶσι, τῆτο εἶ) κύριον, what the Majority of Opinions declare to be null and void, that must be so in Fact and Law. So *Aristotle*, κύριον τὸ τοῖς πλείοσι δόξαν, the Opinion of the Major Part is valid. And *Curtius*, B. x. Let us stand to what the Majority have determin'd. *Prudentius*,

*In Paucis jam deficiente Caterva
Nec Persona sita est Patriæ nec Curia constat.*

—The mighty Crowd now dwindled into Few,
Can no longer Personate the Nation,
Or make up a Court.

And a little afterwards.

*Infirma Minoris
Vox cedat Numeri parvaque in parte quiescat.*

Let

(y) What the major Part approve of must prevail.] This the *Chaldee Paraphrast* and the *Rabbins* take to be the meaning of that Passage in *Exod. xxiii. 3.* Add to these *L. duo.* and *L. Pomponius. D. de re judicata;* and what we have below, *B. iii. c. xxx. §. 24.* and what to the same purpose with *Prudentius*, *St. Ambrose* against *Symmachus* has.

Let the Weaker Few give place to Pow'rful Numbers

And silently acquiesce in what they do.

And in *Xenophon* you have this Expression, ἐν τῇ νικῶντι πλεονεκτείναντων πάντων, *We must do all Things in Conformity to the prevailing Opinion.*

XVIII.

What Opinion ought to prevail when the number of Votes is equal.

XVIII. But if the Votes were equal, nothing could be determin'd, because there is not weight enough to turn the Scale of the Affair one way or other; upon which Account it is, that when the *Yea's* and *No's* are equal, (z) the Criminal is suppos'd to be acquitted. And this *Right of Discharge* the Greeks, from the Story of *Orestes*, call *Minerva's Suffrage*; you have this whole Matter display'd in *Æschylus's Furies*, and in *Euripides's Tragedies* of (a) *Orestes* and *Electra*. And this *Equality* does also maintain the Person in present *Possession*; the Reason of which is very well observ'd by the Author of the Problems ascrib'd to *Aristotle*, Sect. xxix. In one of his Controversies, *Seneca* expresses himself thus, *one Judge condemns, and another acquits, in such a Difference of Opinions* (b) *the milder Sentence should carry it.* For so

(z) *The Criminal is supposed to be acquitted.*] L. inter pares. D. de re judicata. See *Julian* about *Eusebia*.

(a) *Orestes and Electra.*] And in his *Iphigenia at Taurica*; in his *Electra* he delivers himself thus:

Καὶ τοῖσι λοιποῖς ὅδε νόμος τεθήσεθαι.
Νικᾶν ἰσοῖς ψήφοις ἔφύγοντ' αἶψα.

*This to Posterity a standing Law shall be
That Equal Votes shall set the Criminal Free.*

(b) *The milder Sentence should carry it.*] *Seneca* in his Controversies, *That Power, which prevails by Charity and Compassion, ought never*

so in *Logical* Conclusions the Inference follows the more favourable Part of the Proposition.

XIX. But here a Question does commonly arise about either *joining* or *dividing* Opinions: And in this Case, if we would follow the mere Law of Nature, that is, provided there be no Agreement or Law to the contrary, we should distinguish those Opinions that *entirely* differ from those, that tho' they do differ in the *main*, yet do in *part* agree, (*c*) that so the one may be *join'd* in that to which they *both* agree, tho' the others cannot. Thus they who fine a Man *Twenty*, and they who fine him *Ten*, may unite in their Sentence of *Ten* against those who would quite *acquit* him. But they who are for having a Criminal *suffer Death*, and they who are for having him *Transported*, can never unite in their Verdicts, because these are things

XIX. *What Opinions are to be divided, what to be join'd.*

never to displease us. Nay, amongst the Hebrews, the odd casting Vote pass'd for nothing; so the *Chaldee* Paraphrast observes upon the aforesaid Passage of *Exod. xxiii*, and *Moses de Kotz*, in his *xcviii*th Injunction, and his *cxcv*th Prohibition.

(*c*) *That so the one may be join'd in that to which they both agree.*] And therefore, (as *Asconius* upon *Tully's* Oration for *Milo* observes) the *Senators* were order'd to divide an Opinion that contain'd in it several Propositions together. *Cicero* in his Letters to particular Friends, B. 2. *When* therefore *Bibulus's* Judgment was declared first, that three General Officers should be dispatch'd to fetch the King; *Hortensius's* next, that you without an Army should conduct him back; *Volcatius's* in the third place, that *Pompey* should bring him: 'Twas demanded that what *Bibulus* advis'd, might be consider'd distinctly, and in Parts; as to what he said of taking the Oaths, which indeed could not handsomly be oppos'd, 'twas unanimously agreed to: But most of 'em were against every thing else that related to the dispatching of three General Officers. *Seneca*, Epist. 21. What is usually done in the Senate, I think as reasonable to be practis'd in Points of Philosophy: When any Body has advanced what does in some respect please me, I bid him divide his Opinion, and then I shall come into his Notions. And in his Treatise *de Vita Beata*, chap. 3. I have a Right too of passing my Judgment; one Person therefore I shall assent to, another I shall desire to part his Thoughts of the matter. This Custom is also taken notice of by *Pliny*, B. 3. Epist. 14.

things altogether different, there being in *Death* nothing like *Transportation*. No more can they who would *acquit* him, *unite* with those who are for *Transporting* him, because tho' they both agree not to take away his Life, yet this is not what the *Sentence* does directly import, but is only a *Consequence* drawn from it: For he who is for having a Man *Transported*, is far from *acquitting* him. And therefore *Pliny*, when such an Affair fell out in the *Senate*, did very smartly observe, that they were so wide in their *Sentiments*, that it was impossible for 'em not to be single in their *Votes*; and that it was not a *Farthing* matter, if what *displeas'd* some, was no ways *pleasing* to others. And (d) *Polybius* takes notice, that *Postumius* the *Prætor* was guilty of a great piece of *Injustice*, when in summing up the *Votes*, he join'd those who condemn'd the *Captive Greeks*, and those who were for *detaining* 'em some time, against those who were for *discharging* 'em immediately. There's a *Question* of this Nature in *Gellius*, B. ix. and in *Curius Fortunatianus*, in a place where he treats of the *Proportion of Quantities*: And in *Quintilian* the *Father*, in his 365th *Controversie*; the *Expression* runs thus: Now you plainly reduce several into one; and by dividing 'em, weaken those numbers that together would be a *Prejudice*. Two of 'em are for *Banishing* you; two of 'em for *exposing* you; would you have me then unite 'em, when they thus divide themselves?

XX. The Right of the Absent devolves on those who are present.

XX. Now to this we may add; that if any, by Reason of *Absence*, or any other *Obstruction*, are incapable of making use of their own *Right*, that *Right*, for the time being, devolves on those who

(d) *Polybius*] See *Fulvius's* Notes upon that place.

who are present; which (e) Seneca in one of his Controversies hints at; supposing your self a common Slave, you must serve the Master (f) who is present.

XXI. As to (g) the Rank naturally to be observ'd among the Members of a Society, 'tis according as every Man enter'd into it. So among Brothers, the Rule is for the Eldest to take Place of the rest, and so on, without any regard to other Qualifications: For as Aristotle says, ἴσοι πλὴν ἑσθ' ὅσον ταῖς ἡλικίαις διαλλάττεσθαι, They are equal, only as they differ in Age. Theodosius and Valens, in a Constitution regulating the Rank each Consul ought to keep, very pertinently ask, When Persons are of one and the same Quality, and in one and the same Post, who should have the Precedence, (h) but he who was first advanced to that Dignity? And therefore 'twas the Ancient Custom among Christian Kings and States, for those who had first em-

XXI. *What Rank is to be observ'd amongst Equals, even if they be Crown'd Heads.*

VOL. II. K embraced,

(e) Seneca in one of his Controversies.] B. 3. contr. 19.

(f) Who is present.] So that even a single Person may be said to act in the Name of the whole Community. L. Sicut. D. quod cuiusq; universitatis nomine, where consult Wesembecius. Add to these, L. Rescriptum, D. de pactis, Zaf. in parasit. D. de pactis, Bart. in L. 1. num. 31. de Albo Scribendo. Boer. decis. 1. num. 4. Anthony Faber Cod. Sabaud. B. 1. tit. 11. definit 40. Reinking. B. 1. Class. 5. ch. 8. And yet oftentimes in this Case, as well as in that Rule about the Majority, the Laws allow some Exception to be made; for Instance, that two parts ought to be present. L. Nulli, D. in the said Title, quod cuiusq; univ. nomine, L. Nominationum, c. de decurionibus; that the Absent may impower those who are present to take their turns, or may give their Vote by Proxy, c. Si quis iusto de Electione in 6.

(g) The Rank naturally to be observ'd.] About Precedencies, look, if you please, in M. Antony Natta, Conf. DC. n. 22. and Conf. DCLXXXVII. num. 31. Mart. Waeker conf. Caesar in contr. Sax.

(h) But he who was first advanced to that Dignity.] Add L. omnes, c. ut dignitatum ordo servetur. L. Semper. D. de jure immunitatis, L. latter end. c. de Tyronibus.

braced Christianity, to precede the rest (i) in all Councils, where the Affairs of Christianity were manag'd.

XXII. In Societies founded up on a publick Stock, the Votes are to be consider'd, with regard to every one's share in that Stock.

XXII. But here we must subjoin, that when a Society is founded in a thing which all do not equally partake of; as for Instance, if in an *Estate*, or a *Farm*, one has a *Moiety*, another a *third Part*, another a *Fourth*; in this case we must not only let 'em take place according to every Man's share, but also consider their *Votes*, with Regard to that share, that is, *Mensoria proportione*, as the Mathematicians call it, in a *Geometrical Proportion*. And as this is highly consonant to *natural Equity*, so was it also approv'd of by the *Roman Laws*. Thus *Strabo* relates, that when *Libyca* and three other Neighbouring *Cities* were made as it were one *Corporation*, 'twas agreed that they should have one Vote a-piece, *Libyca* two, because this contributed much more to the common Stock than the rest. The same Author tells us too, that in *Lycia* there were 23 *Cities*, some of which were (k) entitl'd to three Voices, some to two, some to one only, and in proportion to this, bore the Taxes and Expence of the Publick. But as *Aristotle* very well observes, this will be reasonable only, εἰ ἀν-
μᾶτον χάριν ἐκωνόντων, if, for the Sake and Interest of what each possess'd, they became one Community.

XXIII. That

(i) In all Councils.] Joh. Fice. Conf. Lat. in. 77. n. 16. Afflictus Herif. Neap. 1. n. 8. Bart. in L. 1. D. de Albo scribendo. Innoc. in c. Tua. de Majoritate & obedientia. Ant. Tiffautus 1 quest. for. 48. n. 5. Tiberius Decanus Resp. 19. n. 183, &c. Innoc. Butor. Felin. in c. Statuimus. c. tit. de majoritate. Bal. in Decernimus, in 2 Notabili, c. de Sacrosanctis Ecclesiis. But especially see Aeneas Silvius, in his History of the Council of Basil.

(k) Entitl'd to three Voices, some to two.] So by the Treaty of Smalkanden the Saxon had two Votes.

XXIII. That Society by which many Masters of Families are incorporated into one People or State, gives such a Body of Men the greatest Power imaginable over its Members, because this is the most perfect Society in the World: Nor is there any outward Act done by any Person, which does not either by it self, or by some Circumstances or other, refer to this Society. And this is what *Aristotle* means, when he says, τὰς νόμους ἀπαγορεύειν περὶ ἀναίτων, That the Laws do in all things prohibit what is proper to be prohibited.

XXIII. The Power of a State over its Subjects.

XXIV. 1. And here 'tis usual to inquire (1) whether Subjects may go out of the State they belong to, without asking leave for so doing. We know there are some People that have no such thing allow'd 'em, as particularly the *Muscovites*; nor do we at the same time disown, but that a Civil Society may be form'd under such Conditions, and that the Custom of the place may have the Force of an express Agreement. By the *Roman* Laws indeed, at least by those of later Date, every Man was at his Liberty to remove his Habitation whither he pleas'd: But yet was he no less obliged to bear a part in all the Offices and all the Expences of his own Town. But then this affected those only who continued within the *Roman* Empire, and the Constitution it self had a more especial Regard to the Payment of Taxes.

XXIV. Whether Subjects may leave the State they belong to, explain'd by a Distinction.

K 2

2. But

(1) Whether Subjects may go out of the State they belong to] Upon this matter see the *Swiss* Articles in *Simlerus* and others. *Servius* in *Excerpt. Fuldens* upon the 1d *Aeneid*, 'Twas the Antient Custom that he who remov'd into another Family, or Nation, should first entirely quit all his Pretensions to that he was in before, and then he should be receiv'd there. Some Instances of Loyalty engag'd to Kings, and afterwards formally renounc'd, you may find in *Mariana*, and a very illustrious one, B. 18. ch. 13.

2. But what we desire to be satisfy'd in, is what would *naturally* obtain, were there no *Agreement* to the contrary; nor are we speaking of *going out* of one *part* of the Kingdom into another, but out of the *whole* State, out of all and every the Dominions of it. That (m) we ought not to go out in *Troops* or *large Companies*, is sufficiently evident from that *Obligation* we all lie under of pursuing a just and proper *End*, which in things of a moral Nature has the Force of a *Positive Law*: For if this were once permitted, *Civil Society* could no longer subsist. As for particular People's leaving their Country, it's indeed a different Case; as 'tis one thing to *draw Water* out of a River, and another to *divert* the Course of that River. Tryphoninus says, that *every Man's* at *liberty* to *chuse* his own Place of Settlement. And Cicero in his Plea for Balbus, commends that Privilege which every one has of *not staying* in any City against his own Inclinations: And he calls the Power of either keeping or parting with one's Right, the Foundation of Liberty. But even here must we observe that Natural Rule of Equity, which the Romans, in the Dissolutions of private Societies, always had regard to; that it is *never* to be allow'd of, when the Interest of the Society requires it otherwise. For as Proculus excellently remarks, *We should always do, not that which is for the private Advantage of any one of its Members, but what is for the Good of the whole Society*. Thus for instance, (n) 'tis no ways for the Benefit of a *Civil Society*, if

(m) *We ought not to go out in Troops.*] Zonaras speaking of King Lazarus, who had revolted from the Persians to the Romans, γὰρ τὸ ἀπὸ τῶν Περσῶν ἔλθον καὶ πρὸς τοὺς Ῥωμαίους ἔλθον &c. The occasion of the War between the Romans and the Persians was this, the King of the Romans had Entertain'd their Subjects as his own.

(n) *'Tis no ways for the Benefit of a Civil Society.*] Bembo B. 7.

if there be any great publick Debt contracted, for an Inhabitant to leave it, unless he be ready to pay down his Proportion towards it: Or if a *War* be undertaken upon a Confidence in the number of Subjects to support it, and especially if a Siege be apprehended, there no Body ought to quit the Service of his Country, unless he substitutes another in his room, equally qualify'd to defend the State.

3. Excepting in such cases as these, 'tis very probable that a Government agrees, that its Subjects may freely depart, because from this Privilege they themselves may reap no less an Advantage.

XXV. (o) Nor has the Publick any Power over Exiles. The *Heracleidae* being by *Eurystheus* banish'd *Argos*, do in *Euripides*, by the Mouth of *Iolaus* their Guardian, thus express themselves,

XXV. A
State has no
Power over
those it has
Banish'd.

Πῶς ἂν δικάως ὡς Μυκηναίους ἀγοί
ᾧ Ω δ' ὄντας ἡμᾶς, ἔς ἀπήλασε χθονός;
Εἶνοι γ' ἴσμεν.

For with what Justice can he claim us
As Mycencians, when we're settl'd here,
Us whom he banish'd from his Country?
We now are Foreigners.

Alcibiades's Son, in one of *Isocrates's* Orations, speaking of the time of his Father's Banishment, ὅτ' ἔδειν αὐτῷ τὸ πῶτεως πρὸς ὅντιν, (p) when the State had nothing to do with him, nor he with the State.

K 3

(o) Nor has the Publick any Power over Exiles.] See below, B. 3. ch. 20. §. 41.

(p) When the State had nothing to do with him.] *Nicetas* in the Affairs of *Isaac Angelus* B. 1. μὴ καίνον &c. 'Tis no new thing for a Man who finds a Person at Home his Enemy, to address himself to a profess'd Adversary abroad, and to Court him as a Friend.

State. Now an *Association* of many People, either by *themselves*, or their *Principals*, is a *Confederacy* or an *Alliance*; of the Nature and Effects of which, we shall have an opportunity of Discour-
sing when we come to talk of the Obligations that arise from *Treaties*.

XXVI.
*What Power
is granted a
Man over
his adopted
Child, from
his volunta-
ry Subjetti-
on to him.*

XXVI. Voluntary *Subjection* is either *Publick* or *Private*; voluntary *Private* Subjection may be as various, as there are various sorts of Govern-
ments. The most Reputable kind of it is *Arro-
gation* or *Adoption*, by which a Person does so give himself up into another's Family, as to behave himself with that Submission and Duty towards him, as is requir'd of a *Son* at the Years of Ma-
turity, towards his *Father*. But the real Father can never so far resign his Son to another, as that the *Paternal* Right should pass entirely to him, and he himself be discharg'd from all *Parental* Duties; for Nature will by no means suffer this: But however, he may recommend his Child to another, and, as it were, by *substituting* him in his own stead, leave him to be altogether provided for, and brought up by him.

XXVII.
*What Right
a Person has
over his Ser-
vants or
Slaves.*

XXVII. 1. The most Ignoble and Scandalous kind of *Subjection*, is that by which a Man offers himself to perfect and utter *Slavery*, as those amongst the *Germans*, who at the last Stake ventur'd their very *Liberty* upon the Cast of a Die: He that lost, says *Tacitus*, voluntarily became a Slave to the Winner. Nay, even amongst the *Greeks*, as *Dion Pruseensis* in his 15th Oration relates, *μύριοι δὴ πρὸς ἀποδοῦναι ἑαυτῆς ἐλευθερίᾳ οὖντες, ὥστε δουλέιν καὶ συγγεγενῆσθαι*, Thousands who are Free, (q) oblige themselves by Contract to be Slaves.

2. Now

(q) Oblige themselves by Contract to be Slaves.] This was formerly prohibited by the *Aegyptians*. At *Athens* 'twas allow'd of till *Solon's*

2. Now *perfect* and *utter Slavery*, is that which obliges a Man to work all his life long for *Diet* and other common *Necessaries*; which indeed, if it be concluded upon Just and Natural Terms, (r) has nothing too hard and severe in it; for that constant Obligation to Service, is pretty well recompenc'd by the constant Certainty of being provided for; which those who let themselves out to daily Labour, are often far from being assur'd of: And from hence does that which *Enbulus* said, frequently happen;

Ἡθελει δ' ἀνευ μισθοῦ παρ' αὐτοῖς καταμένειν
Ἐπὶ σίτισις.

*He was willing with 'em without Wages to stay
For his Victuals.*

And the same Comedian in another place,

Πολλοὶ φυγόντες &c

*Many who from their Service run; when free,
Quit their wretched Liberty, and soon again
(s) Their Master's Kitchen wish for.*

Thus too *Pofidonius* the *Stoic* has observ'd from *Historical Relations*, that there were several People formerly, who, sensible of their own Weakness

K 4

and

Solon's Time; he order'd σώμασι μὴ δανείζεσθαι. Not to borrow upon their Bodies. *Plutarch* in his Life of *Solon*. The *Petilian Law* at *Rome* injoin'd the same.

(r) Has nothing too hard and severe in it.] See *Busbequius's* famous Dissertation upon that Subject in his 3d Foreign Letter.

(s) Their Master's Kitchen wish for.] One in *Plautus*,

If I were Free. I should be at my own Expence, but
Now I live at yours.

Melissus of *Spoleto* the *Grammarian* refus'd his Freedom;

and Incapacity for getting a Livelihood, voluntarily submitted themselves Slaves to others, *ὅπως ἔσται ἐκείνων* &c. That having every thing that was necessary taken care of for 'em; they should in return do them all the Service they were able. Others add an Instance of this in the *Mariandini*; who, for the same Reason, made themselves Slaves to the *Heracleptæ*.

XXVIII.
How far
the Power
of Life and
Death may
be said to be
compre-
hended in
this Right.

XXVIII. But no Masters (I mean in strict and Internal Justice) have the Power of Life and Death over their Servants: Nor can one Man have any Right to kill another, unless he has committed some Capital Crime. Tho' by the Laws of some Nations, the Master, who upon any Account whatever, Murders his Servant, does it with Impunity; as indeed Kings, who have a most absolute and uncontrolable Power, may every where do it. *Seneca* has, long before us, made this comparison, *If the Necessity he is under, and the Dread of suffering severely in case of a Default, makes it impossible for a Slave to be entitl'd to any Merit for his Service, the same will be a sufficient Objection to any Plea of Merit in him who has a Prince, and in him who has a General; for, tho' under a different Denomination, their Authority is the same.* Not but that a Servant may undoubtedly be injur'd by his Master, as the same *Seneca* judiciously asserts. But then this Exemption from Punishment only, is very improperly term'd a Right or Power to the Fact it self. 'Twas such a Right or Power that *Solon* and the old Roman Laws granted Parents over their Children. Thus *Sopater*, *ἐξ ἡλικίας ὄντι* &c. He was allow'd, as a Father, to kill his Children. He is allow'd it, in case they have committed any Crime; and indeed the Reason, why the Law has indulg'd a Parent this Privilege, is, the Presumption that he would certainly prove a very equitable Judge. And *Dion* in his 15th Oration says, that the same Right does

does prevail *παρὰ πολλοῖς καὶ σφόδρῃ ἐννομεμένους*, among several People, and those the most eminent for good Discipline and Constitutions.

XXIX. ^r. Concerning those who are Born of Slaves, the Point is still more difficult; by the Roman Laws, and those of other Nations, (as we shall shew elsewhere) as the young ones of Beasts, so the Children of Slaves follow the Condition and Circumstances of the Mother: Which however is not altogether so agreeable to the Law of Nature, when the Father can by any sufficient Token be discover'd. For since among Brutes (*t*) the Sires no less than the Dams take care of their Young, 'tis evident, that the Young do belong as much to the one as the other. And therefore, if the Civil Law had been silent in the matter, (*u*) Children would

XXIX.

What the Law of Nature directs about Children born of Slaves.

(*t*) The Sires no less than the Dams take care of their Young.] See below Ch. 8. §. 18. Pliny 10, 34. speaking of Pigeons, Both have an equal Affection for their Young.

(*u*) Children would have partaken as much of the Father's Condition as that of the Mother.] Seneca of Benefits. 7. 12. In the same manner as Children belong to both Father and Mother. The Westgothic Law, B. 10. tit. 1, 17. For if the Child receive its Being from both Parents, why should it be tack'd to the Condition of the Mother only, since without the Father it could never have been begotten? And then a little afterwards, This Law of Nature very rationally induces us to part the Issue, that one Man's Maid shall have by another Man's Servant, in just-shares between both Masters. The Issue of a He and She-slave went with the Father; Spec. Saxon, 3, 37. There was the same Custom in some parts of Italy, c. licet de conjugio servorum. Among the Lombards and Saxons the Issue follows the inferior Party, Spec. Sax. 1, 16. The same Custom prevail'd amongst the Westgoths in Spain in Isidore's time, as you may learn from c. ult. caul. 32. quest. 4. One Born of a Slave and a Free-Woman, is by the same Westgothic Law a Slave, 3. tit. 2, 3, 4. tit. 5, 7, 9. tit. 1, 16. Those who are born of a Man and Maid Servant, are divided among the Masters. If there be but one Son, the Man-Servant's Master has him, paying half the value of him to the Maid-Servant's Master. By an Edict of Theodoric mention'd in Cassiodore, the Master of the Original Father had two shares in the Children thus descended, the Master

would have partaken as much of the *Father's* Condition, as of that of the *Mother*. Let us suppose then, for the Ease of the Inquiry, that both *Parents* are *Slaves*, and let us see whether so their *Children* would be *naturally Slaves* too. If there were indeed no other way of maintaining their *Children*, *Parents* might with *themselves* bring their *future Progeny* into *Slavery*: Because upon the very same Account *Parents* may even *sell* their *Free-born Children*.

2. But since this *Right* does *Naturally* arise from mere *Necessity*, (*x*) 'tis in no other Circumstances allow'd, that *Parents* should *enslave* their *Children*; nor have *Masters* any other *Right* over the *Children* of their *Slaves*, than as they are to (*y*) find 'em *Victuals* and other *Necessaries* of *Life*; and therefore when the *Children* of *Slaves* have been a long *Time* maintain'd before they are capable of being serviceable to their *Master*, and their *Work* then can only answer the *Expence* of their present *Maintenance*, such *Children* can never quit their *Service*, unless they pay what is *Reasonable* for all their former *Entertainment*. If indeed the *Master's Cruelty* be extremely great, 'tis an *Opinion* highly probable, that those
Ser-

Master of the Original *Mother* but one. In *England*, a *Person* is either a *Free-man*, or a *Vassal*, from his *Father*; and the same Thing is observ'd in other *Distinctions* of *Condition*. *Littleton* of *Villanage*, and a *Book* of his in *Commendation* of the *English Laws*. These *Laws*, tho' different from the *Roman Civil Law*, are not however, as *Thomas Aquinas* acknowledges, repugnant to the *Law* of *Nature*. Why not, since by the *Mensian Law*, among the *Romans*, whoever was born of either *Parent* a *Foreigner*, should himself be reputed a *Foreigner* too? As *Ulpian* informs us in his *Institutions*, *Tit. de his qui in potestate*.

(*x*) 'Tis in no other Circumstances allow'd that *Parents* should *enslave* their *Children*.] So *Charles the Bald* enacted too in his *Edict* at *Pistres*, ch. 39.

(*y*) Find 'em *Victuals* and other *Necessaries* of *Life*.] See *Leo Afer*, B. vi. de *Barca*.

Servants, even they, whose Slavery was their own Choice, may *run away*, and in that Manner consult their Safety. For what the *Apostles* and Ancient *Canons* injoin *Slaves*, of not leaving their Masters, is in general, and only oppos'd to the Error of those who rejected every Subjection, both private and publick, as a State inconsistent with the Liberty of Christians.

XXX. Besides that *Perfect* and *utter* Slavery, of which we have just been speaking, there are also some *Imperfect* kinds of *Servitude*, and those are either for a certain Term of Time, or upon such and such Conditions, or only to do such and such particular Things. Such was the *Service* of those, who, though they were *Freed*, were yet obliged to do some *Offices* for their Patrons; of those, who were to continue *Slaves* no longer than till such and such Articles were perform'd; of those, who were to Labour for their Creditors till their Debts were paid; of those, who were sentenced by a Judge to *work out* the Fine, the Court had levy'd on 'em; of those, who belong'd to such and such an Estate, and went along with it to the next Purchaser; the *seven Years Service* among the *Hebrews*, and that *Service* which was to last till the *Jubilee*; that of the *Penestæ* among the *Thessalians*; that which they call the *Service* of *Mortmain*, and lastly that (22) of *Hired Servants*; all which Differences do depend either upon the Laws or upon particular Agreements. To be born of one Parent who is *Free*, and of another who is a *Slave*, seems *Naturally*, for the Reason above-mentioned, to be a sort too of *imperfect Servitude*.

XXX. Several sorts of Servitude.

XXXI. Pub-

(2) Of not leaving their Masters.] See below B. iii. c. 7. Sect. 6.

(22) Of hired Servants.] Among these, such as in England are call'd *Prentices*, do, during the Time of their Apprenticeship, come very near the Rank and Circumstances of *Slaves*.

XXXI.

What Power there is over a People who Voluntarily become Subjects.

XXXI. *Publick Subjection* is that of a whole Nation, who put themselves under the Power and Jurisdiction, either of *one Person* or of *several*, or even of *another Nation*. The Form of such a *Subjection* we gave you before, in an Instance of *Capua*. Such another is that of the *Collatines*, *Do you to me and to the Roman People deliver yourselves up, you the Collatine People, your City, your Lands, your Water, your Frontiers, your Temples, your Goods, whatever you have Sacred or Civil? We do: And I accept 'em.* Alluding to which *Plautus* in his *Amphitryon* says:

(a) *Themselves, and whate'er's Divine or Human Their Town, their Children, all is surrender'd To the Thebans, and to their Discretion left.*

The *Persians* term this, giving up *Land and Water*. But this is a *perfect* and entire *Subjection*; there are some other *less Tyrannical*, either as to the *manner* of holding 'em, or as to the *Absoluteness* of the *Supremacy*; you may learn the several *Degrees* of 'em, from what we have already said above.

XXXII.

What Power over a Person who has forfeited his Liberty.

XXXII. There is also an *Involuntary Subjection* arising from some *Default* or other, and this happens (b) when he who has deserv'd to lose his *Liberty*, is forced to submit himself upon any Terms to

(a) *Themselves and whate'er's Divine or Human.*] This was what the *Persians* call'd *surrendring Earth and Water*.

(b) *When he who has deserv'd to lose his Liberty.*] As those *Companions of Ulysses*, who robb'd the *Egyptians*; of whom *Homer* in his *XIVth Odyss.*

Ἐνδ' ἡμέων πολλὸς μὴ ἀπέχλανον δέει χαλκῷ,
Τὴς δ' ἀγὰγον ζῶες σφίσιν ἐργάζεσθαι ἀνάγκη.

There

to him, who has a Right to *punish* him; and *who* it is *who* has such a Right of *punishing* we shall see by and by. And here not only *particular* Persons may be thus brought into a *particular* Subjection; (c) as *those* at *Rome*, who did not answer to their *Summons*; or *those* who to avoid the *Taxes*, *conceal'd* their Effects, and so escap'd from being publicly *inroll'd*; and afterwards indeed, *those* Women who marry'd another's *Servant*: But besides these, there is also the *publick* Subjection of a whole *People* for a *publick* Offence; with this Difference only, that a *Nation's* Slavery is *perpetual*, for a *Succeſſion* in the *Parts* of it does no ways hinder it from being *one* and the *ſame* *People* still; whereas that *Slavery* which is inflicted on *particular* Persons, extends no farther than their *own selves*, because the *Crime* is *Personal*, and can only affect the *Party* offending. But *both* sorts of *Servitude*, either that which is *publick* or that which is *private*, if by way of *Penalty* and *Demerit*, may be either *more* or *leſs* according to the *Nature* of the *Misdemeanour* and its *Punishment*.

But of that *Slavery*, whether *publick* or *private*, that is owing to the *Voluntary* Right of *Nations*, we shall hereafter have Occasion to speak, when we come to mention the *Conſequences* and *Effects* of *War*.

CHAP.

*There many of us to the Sword they put
Others reſerv'd alive, but to hard Service forc'd.*

So *Jupiter*, entreated by *Latona*, made *Apollo* a *Slave*, when he had design'd to have caſt him into *Hell*; *Apollodorus* has this Paſſage, B. iii.

(c) *As those at Rome, who did not answer to their Summons.*] Among the *Lycians*, Thieves were ſo puniſh'd; as *Nicolaus Damascenus* reports. Among the *Weſtgoths* ſeveral other Malefactors, as appears from their *Laws*.

C H A P. VI.

Of an Acquisition (Possession or Purchase) deriv'd from a Man's own Deed; where also of the Alienation of a Government, and of the Things and Revenues that belong to that Government.

I. What is required in the Giver to make the Alienation valid.

I. 1. **A** Thing becomes ours from a *Derivative Acquisition*, either by Vertue of a *Deed of Gift*, or by *Law*; for, *Property* being first admitted of, it will easily follow from the *Law of Nature*, that Men have a Power of *disposing of* or *transferring* all or any part of their *Effects* to other Persons; for this is in the very Constitution of *Property*, and therefore *Aristotle* says, *ἕως τῆ οἰκείου ἐν, ὅταν ἐφ' αὐτῷ ἢ ἀπαλλοτρίωσαι*, 'tis the Definition of *Property* to have in ones self the Power of *Alienation*; but there are two Things here to be observ'd, the one in the *Giver*, and the other in the *Receiver*. In the former, 'tis required that whatever he does in this kind should appear by *Words*, or by some other open or *External Sign*, the *Internal Act* of his own *Will* and *Mind* being no ways sufficient; nor is such an *Act*, as we have observ'd elsewhere, agreeable to the Nature of *human Conversation*.

2. But that there should be a *Formal Delivery* made, is what is requir'd by the *Civil Law*; which, because it is now received by most Nations, is, *improperly*, styl'd the *Law of Nations*. So in some Places we find it Customary for such an *Alienation* to be made in Publick, either before the *People* or before some *Magistrate*, and that the Particulars thereof be also *Recorded*; all which Circumstances are most certainly owing to the *Civil Law*. And

as

as for the Act of a *Will*, that is thus express'd by some *External Sign*, 'tis always to be suppos'd the Act of (a) a *Will* govern'd and directed by *Reason*.

II. So also in the *Receiver* (without any Regard to the Civil Law) 'tis *Naturally* required, that his *Willingness* to accept of what is given him do appear by some *outward Sign* or other; which *Willingness*, though it does generally succeed the Gift or Alienation, may also be sometimes Antecedent to it, as for Instance, if any Man shall request that such a Thing be given or granted him; for 'tis here to be suppos'd, that that *Desire* continues still, unless it appears that he has alter'd his Mind. What further relates as well to the *Transferring* as the *Receiving* of a Right, and how both these may be *Legally* done, we shall hear by and by, in that Chapter where we Treat of *Promises*; for in this Respect (b) to *Alienate* and to *Promise* is the same Thing, even by the *Right of Nature*.

II. What is the Receiver.

III. Now as it is in other things so it is also in *Crowns* themselves, they may be alienated by him who has a just Title in 'em, that is, as we shew'd above, by a *King*, if the *Crown* be *Patrimonial*; otherwise (c) by the *People*, but not without the *King's*

III. Crowns may be alienated sometimes by the King, sometimes by the People.

(a) *A Will governed and directed by Reason.*] Cassiodore ii, 11. The Conveyance of ones Property requires a sound and solid Judgment.

(b) *To Alienate and to Promise is the same Thing.*] And therefore Presents may be sent by Messengers to those who are Absent and at a Distance, as Servius observes upon that Passage of the IXth Æneid.

Cum Jungeret absens,

When Absent, join'd in Hospitable Ties. Dryden.

(c) *By the People.*] Bal. and Oldradus, in c. intellecto de jurejurando. The same Baldus, Conf. 327, n. 7. Cardinal Thoms. p. p. Concl.

King's Consent, because he too has some Right in it, though it be only that of the present Possession and Profits, which Right he ought not to be depriv'd of contrary to his Will. And thus much for the *whole* Sovereign Power.

IV. The Government over one Part of the People cannot be alienated by the other, if that Part do not give their Consent.

IV. But in Transferring a *Part* of the Government there is something else required; (*d*) it must be done with the *Consent* of that Part also, which is to be thus transferr'd. For when Men form themselves into a State, they make together, in respect of those *Parts*, which are called *integral*, a sort of *Perpetual* and *Immortal* Alliance; from whence it follows, that these Parts are not so subjected to the Body, as the *Limbs* of a *Natural* Body are, which entirely depend on the Life of that Body, and therefore may be justly cut off for the *Service* of it; for this Body that we are now speaking of, is of a Constitution very different from that, it being form'd by *Compact* and *Agreement* only, and therefore the Right that it has over its particular Members, is to be determin'd by looking into the *Intentions* of those who *Originally* fram'd it; which can never be reasonably imagin'd to be such, as to invest the Body with a Power to cut off its *own* Members, when ever it pleases, and deliver 'em up to *another's* Disposal.

V. Nor can such a Part transfer the Government over its own self, unless in Case of extreme Necessity.

V. So on the other hand, no *Part* has a Right to separate from its *Body*, (*e*) unless it plainly appears that 'tis absolutely Necessary for its own *Pre-*

Concl. 40. 11. 1. and Concl. 694. You have Instances of this in *Harau*, Tom. ii. in the Year MDXXVI. and in *Guicciardin*. B. xvi.

(*d*) It must be done with the *Consent* of that *Part* also which is to be thus transfer'd,] Gail. ii. *de pace publica*, c. vx. n. 14. See *Serranus* in the Life of *Charles the Wise*, and in that of *Francis the First*, where he speaks of *Burgundy*.

(*e*) Unless it plainly appears that 'tis absolutely for its own *Preservation*.] Compare here what's said below in this Book, ch. 24. §. 6. For

Preservation; for, as we before observ'd, in all Matters of human Institution, cases of *Necessity*, by which all Things return to a *State of Nature*, are always excepted. *St. Austin de Civit. Dei B. xviii.* In almost all Nations this Voice of Nature has been loudly heard, that they should rather submit to their Conquerors, than suffer all the Ruin and Havock of War. And therefore in that Oath of the Greeks, by which the Greeks, who surrender'd to the Persians, forfeited their Lives, this Clause was subjoin'd, *μη ἀναγκασθέντες*, unless Irresistibly compell'd to it.

VI. And from hence it is easie to comprehend, why in this Case a *Part* has a better Right to preserve it self, than the *Body* can have over the *Part*; because the *Part* makes use of that Liberty it had before it enter'd into that Society; but it is quite otherwise with the *Body*. Nor let any Man pretend to tell me, that the *Sovereign Power* is lodg'd in the *Body*, as in its proper Subject, and may therefore be alienated by it, as well as any private Thing or Possession. For it is placed in such a proportionate manner in the *Body*, as to be equally diffus'd through all its Parts, just as the Soul in a Compleat Natural Body, not divisible,

VI. The Reason of this Difference.

VOL. II.

L

or

For this Reason it was that *Anaxilaus*, who, compell'd by *Famine*, had surrender'd *Byzantium*, was acquitted by the *Spartans*. *Xenophon's History of Greece B. i.* And the Emperor *Anastasius* return'd his *Commanders* Thanks for delivering up *Martyropolis* to the *Persians*, when it could no longer be defended, *Procop. περὶ ἱστοριῶν*. And the same *Procopius*, *Gothic. iv. ἀναγκῇ καὶ ὄρεσι*. *Courage and Famine can never dwell together, 'tis more than Nature can bear to pine with Hunger, and yet to play the Part of a stout and vigorous Man.* And in *Ann. Commen. B. iv.* in *Cephalas's* Letter to the Emperor *Alexius* about the Siege of *Larissa*. *ἀναγκῇ καὶ ὄρεσι*. *Complying with the Necessity of our Affairs (for what can we do against the Tyranny and Force of Nature?) we have determin'd to give up the Place to those, who not only block us up, but evidently straiten us to Death.*

or capable of being divided into any more Bodies. But as for that *Necessity* which reduces a Thing to the *Right of Nature*, it has nothing at all to do in this Place; the common Occasions of Nature are indeed comprehended under that Right, such as *eating* what is now another's Victuals, *detaining* what is now none of our own, which are all Natural Circumstances; but the Right of *Alienation* is no ways included there, which is founded upon *human* Institution, and must therefore take its Measures accordingly.

VII. The
Jurisdiction
over a Place
may be
transfer'd.

VII. But why the *Jurisdiction* over any particular Place, that is, any Part of a Territory, that lies, suppose, uninhabited and waste, may not be alienated by a *Free People*, or by a *King* in Concurrence with his People, I see no manner of Reason to dispute. Were indeed any Part of the People to be transfer'd, as they have a *Freedom of Will*, so have they likewise a Right to *oppose* such an *Alienation*; but the Territory, whether consider'd wholly or in relation to its Parts, belongs in common and inseparably to the People, and consequently is entirely at their Disposal. And certainly, if the *Jurisdiction* over any part of the People cannot be alienated by the People themselves, much less can it be done by a *King*, who though he be vested with the full Sovereignty, yet has not that Sovereignty *fully* in himself; a Distinction we made above.

VIII. The
Opinion
that a
Prince may
for Advantage
or out
of Necessity
make over
some Parts
of his Kingdom,
refuted.

VIII. For which Reason we can never agree with those Lawyers, who to the general Rule of *not Alienating* the Parts of a Government, subjoin these two *Exceptions* of *Necessity* and the *publick Good*; unless we understand 'em in this Sense, that where the *Advantage* is equal on both sides, we may even from their Silence, though of no long Time, conclude that they agree to it, and much

more

more so, if there appears besides any *Necessity* for such a Separation; but if either of 'em shall openly declare the contrary, we must look upon such an Alienation to be utterly Null and Void, unless, as we before observ'd, the *Part* should be *Irresistibly compell'd* to separate from the *Body*.

IX. Under the Title of *Alienation*, is justly comprised an *Infeoffment*, or *Granting* a Dominion in *Fee*, under the Penalty of *Forfeiture*, in case of *Trespass*, or *Breach* of the *Feudal Conditions*, or for want of *Issue*; for even this is a *Conditional Alienation*. Wherefore we find, that (f) as *Alienations*, so likewise some *Infeodations* of Kingdoms, which *Princes* have made without the *Peoples* *Approbation*, have by many of 'em been render'd void. Now the *People* are understood to give their *Approbation*, either when they assemble in a whole *Body* for that purpose, as was formerly the Custom with the *Galls* and *Germans*, or when they signify their Consent by particular *Deputies* commission'd thereunto, and invested with a sufficient Power from the *States* and *Provinces* which they represent; (g) for whatever we do by *another*, is equally the same as done by *our selves*. Nor can any part of the Dominion be *Mortgaged*, except it be done by the like Agreement, not only for that Reason, because a final *Alienation* usually follows such an *Engagement*, but because a *King* is bound to the *People* to exercise the *Sovereign Power* by *himself*, and the *People* are on their parts oblig'd to do all they can to preserve the Administration

IX. *Infeoffment and Mortgaging are a sort of Alienation,*

L 2

(f) *As Alienations, so likewise some Infeodations, &c.] And Remissions of Homage too. See Gromer Polon 25.*

(g) *For whatever we do by another is equally the same as done by our selves.] So, where the Crown is Elective in all Alienations the Consent of the Electors does. by Custom and Agreement, so for the Consent of the whole States.*

of the Government *entire*, which indeed was the Motive of their first entring into a Civil Society.

X. The Peoples Consent and Approbation either particularly express'd or founded on Custom is requir'd to the transferring even of smaller Jurisdictions and Employments in the State.

X. But as for *Civil* Employments of a less considerable Trust, I see no Reason why the *People* may not grant 'em, even for an Hereditary and Perpetual Right, when it no ways affects the *whole Body*, nor is any ways destructive of the *Sovereignty* it self; but the *King* cannot do so without their Consent, I mean, if we keep our selves within the Bounds of Nature; because a *temporal Power*, such as is that of *Kings Elective*, and of those who owe to the Law their Succession to the *Crown*, can produce nothing but *Temporal Effects*. Yet might the *People*, as well by their *express* Consent, as by a Consent *tacitly* introduced by *Custom*, (and this is what we see does now almost every where prevail) give up this Prerogative to their *Princes*. And we frequently find in History, that this was a Prerogative which the *Kings* of the *Medes* and *Persians* enjoy'd, who gave away not only *Towns*, but even whole *Countries* to be held for ever.

XI. Princes cannot alienate that part of the Crown's Revenue which is intended for the Service of the State.

XI. Nor can that *Revenue* of the *Crown*, which is (i) the *Peoples Demain*, and appropriated to the *Service* of the *Publick*, or to the *Maintenance* and *Support* of the *Royal Dignity*, either *wholly* or in *part*, be alienated (k) by *Kings* who have no

(h) Not only *Towns* but even whole *Countries*.] As the City and Island of *Samos* was given by *Darius* to *Syloson*.

(i) The *Peoples Demain* and appropriated to the *Service* &c.] The *Ancient Greeks* call'd the *Crown-Lands*, *temple Lands* separated or cut off from the *Publick* and granted to their *Princes*. You have several Examples in *Homer*, of *Bellerophon* among the *Lycians*. *Iliad* 6. Of *Meleager*, *Iliad* 9. Of *Glaucus Lycias*, *Iliad* 12. where consult the *Scholiasts*.

(k) By *Kings*.] Without the Consent of all the *States*. There's an Instance of it in *Thuanus*, B. 63. in the Year *MDLXXVII*.

no more than a *Tenant's* Right to it. Nor do I at all allow the Exception, *if the Thing be but of little value*, because I can have no Right to make over the *smallest* part of what is none of mine at all. But the People indeed when they *know* the Affair, and are *silent* in it, may much more *easily* be suppos'd to consent in *smaller* Matters, than in those of *greater* moment. And in this Sense too, what we just now observ'd, of *Alienating* any of the parts of a Government in cases of *Necessity*, or for the *publick Advantage*, may be apply'd to what concerns this *Revenue*; and the rather, because the thing we are speaking of here, is of far less Consideration. For the *Revenue* it self was for no other Reason settled, than for the Interest of the State.

XII. But here lies the Mistake of many, they confound the *Revenue* and *Profits* of the *Demain*, with the *Demain* it self. Thus, for instance, the *Right* of *Floods*, or of what the *Sea* or *Rivers* cast up and join to the Land, is in the *Demain*, but the Advantages accruing by 'em, or what is thrown up by the *Tide* or *Stream*, is in the *Revenue*. The *Power* of levying Taxes is in the *Demain*, the *Money* arising from thence in the *Revenue*: The *Right* of *Confiscation* in the *Demain*, the Lands thus *Confiscated* in the *Revenue*.

XIII. But after all, *Princes*, who have a full and *absolute* Power, that is, who have a Power upon occasion, and when *Reasons* of State require to levy new *Subsidies*, may, upon such an Occasion, *Mortgage* any part of the *publick Patrimony*. For as *Subjects* are oblig'd to pay such *Subsidies* as are laid upon 'em, upon such *Reasons* of State, so are they no less oblig'd to *redeem* what is upon such *Reasons* mortgaged: Because that very *Redemption* is no more than a sort of Payment of *Subsidies*. And the *Patrimony* of the *People* is engag'd to the *Prince*, as

XII. The *Revenue* of the *Demain* or *Patrimony*, must be distinguish'd from the *Demain* or *Patrimony* it self.

XIII. How far, and why some parts of the *Crown's* or *Peoples Patrimony* may be mortgag'd by the *Prince*.

a *Security* for the Payment of the Debts of the *State*. And whatsoever is thus pawn'd to me, I have also a *Right* to pawn again. What we have hitherto said of this matter, will only hold good, provided there be no particular Law added, which shall either enlarge or confine the Prerogative of *Prince* or *People*.

XIV. That a Will or Testament is a kind of Alienation, and of natural Rights.

XIV. 1. And here you would do well to observe, that when we are treating of an *Alienation*, we design under that Head to include also a *Will* or *Testament*. For altho' a *Will*, as some other Acts, does receive its *Form* from the *Civil Law*; yet is it in Substance and Reality something very like *Property*, and, that being granted, belongs to the *Right of Nature*; for I may give away my Estate by *Will*, not only absolutely, but on certain Conditions; and that not only irrevocably and for ever, but with a Power too of recalling it, reserving to myself still the *Possession* of it, and the full *Liberty* of enjoying the same. For a *Will* is the making over one's Effects at his Death, 'till then to be revers'd or alter'd at pleasure; and in the mean time reserving the whole *Right of Possession* and *Enjoyment*. *Plutarch* very wisely saw this, and therefore when he had related, that *Solon* allow'd his Citizens the Privilege of making Wills; he adds, τὰ χήματα, κήματα ἢ ἐχόντων ἐπὶ νόμῳ, He thereby made what they had, properly their own. And *Quintilian* the Father, in a Declamation of his, Our very Estates would seem burthensome, if the Property we have in 'em during Life, should be taken away from us as soon as we are dead. 'Twas by this Law that *Abraham*, in case he should die without Issue, was to have left all his Effects to *Eliezer*, as is plain from the Passage (1) *Genes.* xv. 2.

2. But

(1) *Genes.* xv. 2.] You have *Hercules's Will* in *Sophocles* (*Trachin*) *Alcestides's* in *Euripides*, and in *Homer* (*Odyss.* 16.) *Telemachus's* Donation

2. But that *Foreigners* have not in some Places a Power to dispose of their Effects by Will, is not to be imputed to the Right of *Nations*, but to the particular Laws of that State; and, unless I am mistaken, proceeding from an Age when *Foreigners* were look'd upon as so many *Enemies*; and therefore among the more civilized part of Mankind hath been long since abolish'd and laid aside.

CHAP. VII.

Of an Acquisition deriv'd to one by virtue of some Law; where also of Succeeding to the Effects and Estate of a Man who dies without a Will.

I. NOW that *Derivative Acquisition*, or *Alienation*, which is owing to some Law or other, is either from the Law of Nature, or the voluntary Law of Nations, or from the Civil Law. We are not treating of Civil Law here, for that would be an endless Task, neither are the most considerable Disputes in War to be determin'd by it: But we shall only observe, that there are (a)

L 4

some

I. Some Civil Laws are unjust, and therefore do not transfer a Property; such are those that Confiscate the Goods of Shipwreck'd People.

nations in case of Death. which is indeed a kind of Will. And in *Homer* too there's a *Last Will* about managing some Affairs, or ordering some things to be done, as *Plutarch* shews from the words of *Andromache* and *Penelope*. We produced some other Instances of Ancient Wills above, B. 1. ch 4. §. 12. both in the Text and the Notes: That Wills were usual among the *Hebrews*, is plain from *Deut. xxi. 16* and the Son of *Sirach*, ch. xxxiii. 25.

(a) *Some of the Civil Laws.*] As formerly among the *English*, People of *Bresagne*. and *Sicilians*. There's mention of such an old Law in *Greece* by *Sopater* and *Syrianus* in *Hermogen*. *Christian King* of *Denmark* said, that he lost an hundred thousand Pounds a Year by repealing the Law for Confiscating Shipwreck'd Goods. *Brigitta* too

some of the *Civil Laws* that are plainly unjust; as those by which all *Ship-wreck'd Goods* are *Confiscated*. For to take away any Man's Property without a Cause, is manifest Injustice. Very well then has *Euripides* in his *Helena*,

Ναυαγὸς ἦκω ξένῳ, ἀσύλητον γένος.

Wreckt and a Stranger am I come; (b) Circumstances, That secure the sacred Wretch from farther Ills.

For what Right can the Prince's Treasury have (they are Constantine's own words) in the Calamity of any Man, that it should pursue its Advantage in so unfortunate an Affair? And *Dion Prusænsis*, in his 7th Oration, speaking of a Shipwreck, μὴ γὰρ εἶναι ποτὶ, ὧς ζεῖν &c. God forbid that I should gain by Mens Misfortunes.

II. By the Law of Nature a Man gains a just Right to that which he has taken from another, in Satisfaction for his own Debt; and when this holds good.

II. 1. By the Law of Nature, which indeed results from the very Essence and Force of Property, an Alienation is made two ways, by the Accomplishment of a Right, or by Succession. Alienation by the Accomplishment of a Right is effected, when for any thing that is not yet mine, but is due to me, if I cannot get the very thing it self, I take (c) some other

too takes notice of this wicked Custom 8. 6. and so does the *Spec. Saxon* 11, 29. treating of Denmark, and c. *Excommunicationis de Raptoribus*. As also *Crantzius*, *Vandal.* 13, 40. 14, 1. *Cromer.* *Polon.* 21.

(b) Circumstances that secure the sacred Wretch from farther Ills.] Add here, C. nequid. D. de Incendio ruina, naufragio. *Nicetas Choniates* in his Reign of *Andronicus* calls it, ξυγχαλῶτατον, a most unreasonable Custom. See too *Cassiodore* 4. 7. What could *Bodine* mean to defend such Barbarities? He, who reprov'd *Papinian* for chusing rather to die, than wound his Conscience.

(c) Some other thing of an equal value] See what's below. B. 3. ch. vii. §. 6. So *Irenaus* excuses the Hebrews by the very Law of Nature, because the Goods they took from the Egyptians were no more

other thing of an equal Value; for expletive Justice, when it can no ways recover that particular thing that becomes due, does always extend to such other things as by moderate Computation shall be judg'd *equivalent*. Now that *Property* may be *transferr'd* after this manner, may be prov'd by the *Consequence*, which in cases of *Morality* is undoubtedly the best way of Reasoning. For how can I enjoy the full Satisfaction of my Right, unless I become the absolute Master of what I have, for the bare Possession of any thing wou'd be purely needless without the Power to use it as we thought fit; a very ancient Example of this we find in the History of *Diodorus*, where *Hesioneus* seized *Ixion's* Horses, for what, according to Promise, he ought in Justice to have given to his Daughter.

2. We know that the *Civil Laws* do not allow that any Man shall be so far a Judge in his own Case, as to do *himself* Justice; and he that shall take any thing by *Violence* from another, altho' it be in reality his *due*, it shall be accounted no less than a sort of *Robbery*; nay, and in many places he shall by that means *lose* his *Debt*. For tho' the Civil Law did not directly forbid this, yet, since the erecting of *Courts of Justice*, it may be easily presum'd

more than a bare Recompence for the *Services* they had done 'em. For the *Egyptians*, says he, w'd that People not only their Goods, but their Lives too. And *Tertullian*, upon the same Subject, in his second Book against *Marcion*, The *Egyptians* demand their Plate again of the *Hebrews*. The *Hebrews*, on the other Hand, put in their Claim too and alledge that there's a great deal still due to 'em for their Work and Earnings; and he makes it plain that they got much less than was owing 'em. And in *Diodorus Siculus*, *Hesioneus* is related to have taken his Horses, instead of those things which *Ixion* had promis'd his Daughter, but had never been as good as his word. Agreeable to this is what you'll meet with, B. 3. ch. 2.

presum'd to be *Illegal*; but where there are no *Courts* at all to appeal to, 'tis there we must have recourse to the Law of Nature, of which above; nay, tho' the Court shou'd but for the present not act, we might certainly make use of the *Right of Nature*, if the Debtor were *running away*, and there shou'd be no other possibility of recovering our own: Yet so that we can have no *Property* therein, till such times as a formal *Judgment* has passed in our favour, as is usual in the Case of *Reprisals*, of which hereafter; but yet if the *Right* be certain, and it be also morally as certain, that the *Law*, for the want of good Proof, will not give a Man full Satisfaction; in such a Circumstance, it is the more equitable Opinion, that the *Law*, which gives Authority to the Determinations of the Court, has nothing to do here, but that the Affair in Debate returns to its Original State and Right.

III. How
the Succes-
sion to the
Estate of
him who
dies without
a Will does
Originally
and Natu-
rally arise.

III. *Property* being once introduc'd, tho' the *Civil Law* were quite laid aside, (*d*) *Natural Reasons* suggests, that the *Successor* to a Person who dies *without a Will* is only to be known by making a *Conjecture*, what would most probably have been the *Deceased's Will*, or how he might be presum'd to have *design'd* the *Disposal* of his Effects. For since the Nature and Power of *Property* is such, that the *Owner* may *transfer* it to another Person at his *Death*, and yet be in Possession of the same during *Life*, as we said before; 'tis not to be supposed, that

(*d*) *Natural Reason suggests, &c.*] And therefore what is lodged in our Hands in Trust may be given to the Successors *Abintestate*, upon a *Presumption*, that every Man who has a *Family* or *Relations* is willing to leave them all that he lawfully can, says *Paulus L. Conficiuntur. §. 1. De de jure Codicillorum.*

that because a Man dies *without* a Will, that he design'd his Estate for *any* Person who shou'd first lay Claim to it, or get Possession of it, and therefore it follows that such Effects shou'd go to him, to whom there is the greatest Probability that the *Deceased*, had he made a *Will*, would certainly have bequeath'd 'em. *To have known the Intentions of the Deceased*, says the younger *Pliny*, stands for a Law. For in Cases that are doubtful, it is always presum'd that a Man wou'd do that which is the most Fair and Honest. And therefore the first thing here to be done is, to see him discharg'd to whom any thing is owing; and the next, to dispose of what is left, tho' it be not strictly owing to 'em, to those to whom upon the Score of *Duty* or *Relation* it ought to belong.

IV. 1. It is a thing disputed amongst *Civilians*, whether *Parents* are oblig'd to maintain their *Children*? Now there are some who will, by no means, allow that there is any such direct *Obligation*; but yet, at the same time, think that 'tis agreeable to *Reason* that it shou'd be so. 'Tis our Opinion entirely, that we ought to distinguish the Word *Obligation*, which is somet mes taken *strictly* for that which *Justice* obliges us to; sometimes in a *larger* Sense, for that which *Honour* and *Conscience* will not suffer us to omit, as being a Duty that arises from some other Motive than that of *meerly* doing *Justice*. Now the *Obligation* we are speaking of here, is to be taken in this *larger* Sense, except there should be some particular Law that is plainly against it: And 'tis thus that I understand what *Valerius Maximus* has advanced, when he says, that *our Parents*, by maintaining us, have laid an *Obligation* upon us, that we do the same by their *Grand-Children*. And *Plutarch* in his most elegant Treatise of the Affection to ones Children,

IV. Whether any of the Parents Effects are by the Rights of Nature their Children's due; this is explain'd by a Distinction.

οἱ παῖδες ὡς ὀφείλημα τὸ κληρονομεύοντες, (e) *Our Sons expect our Estates after us, as a Debt that we owe 'em.* For, as *Aristotle* has it, whoever gives the *Form* to any thing, gives also what is necessary for the *Preservation* of that *Form*; and therefore whoever is the *Cause* of a *Man's Being*, ought, as much as in him lies, to supply him with such *Necessaries* as will not only support him as a *Man*, but maintain him also as a *sociable Creature*, which seems to be the *Principle Design* of his *Being*.

2. And for this Reason it is, that other *Creatures* too do, by meer and *Natural Instinct*, supply their young *Ones* with such *Necessaries* as are convenient for their *Subsistence*. Hence *Apollonius Tyanus*, what was said by *Euripides*,

Ἄπανι δ' ἀνθρώποισιν ἡ ψυχὴ τέκνα.

Children are, to all Men, another kind of Life.

Has thus alter'd,

Ἄπανι δ' ζώοισιν ἡ ψυχὴ τέκνα.

Their own Issue are, to all Creatures whatever, another kind of Life.

And

(e) *Our Sons expect our Estates after us as a Debt that we owe 'em.* *Julian* in his *Casars*, παῖσι τὸ δὲ &c. 'Tis but just to make our *Children* our *Heirs*. Even our *Daughters*; who, as well as *Sons*, were their *Parents Heirs* by a very *Ancient Custom*, as is evident from the *History of Job* about the latter end. *St. Austin*, with an *Eye* to this *Equity*, would not suffer the *Goods* of those who had disinherited their *Children* to be accepted by the *Church*. The *Passages* are *B. 2. de vit. Cler.* and in his 52d *Sermon ad Fratres in Eremo*, if that be *St. Austin's Work*. *Gratian* has inserted 'em in *Caus. 17. Quast. 4.* near the *End*. *Procop. Persic. 1.* οἱ νόμοι τῶ &c. *The Laws, which in other Respects do universally clash and disagree, do in this Affair as Universally conspire, Romans and Barbarians, all with one Voice, declare Children to be the Heirs of their Father's Estate.*

And (f) this innate Affection he proves by several Arguments, which may be seen in *Philostratus*, B. 7. Ch. 7. and 8. To which Passage that in *Oppian* in his 3d B. *de Venatu*, and his 1st *de Piscatu*, does perfectly agree. And the same *Euripides* in his Tragedy of *Dictys* says, that *This one Law is what all Men have in Common among themselves, and with all other Creatures*. Hence it is, that the Ancient *Civilians* have made the Law of Nature the only Standard in Cases of Education, that is, that Men may do that by the Dictates of Reason, that other Animals are observ'd to perform by the peculiar *Instinct* of their own Natures. A certain *Natural Incentive*, as *Justinian* expresses it, that is, the *sopyn*, a *Natural Tenderness and Affection* urges Parents to provide for the Maintenance and Education of their Children. And in another place, Nature has obliged the Father to maintain either Son or Daughter. So *Diodorus Siculus*, ἀγαθὴ δὲ ἡ φύσις &c. Nature is a kind and indulgent Mistress to all her Creatures, instructing 'em as well for the Preservation of themselves, as for the Conservation of those of their own Species, this Relative Tenderness perpetuating Succession to endless Ages. So by *Quintilian* a Son is introduc'd delivering himself thus, *I claim my Part by the Law of Nations*. And *Sallust* called a Will by which the Son is disinherited Impious and Unjust. And because this is a Debt which we owe to Nature, therefore is the Mother obliged to provide for such Children which she has got by common Conversation with several Men.

3. And tho' the Roman Laws order'd nothing to be left for such Children as were *Illegitimate*, and

(f) This Innate Affection he proves by several Arguments.] *Pliny* 10. 33. speaking of Swallows, They feed their young ones by Turns with the strictest Equity.

and that by *Solon's* Laws it was provided, that a Man shou'd not be oblig'd to leave any thing to his *Natural Issue*; yet the Laws of *Christianity* have very much soften'd this Rigour, by instructing us, that our Children, *however* begotten, shou'd be a part of our Care; and in cases of Necessity, we ought to do for them whatsoever is necessary for the Support of their Lives; but *farther* than this is no Man oblig'd by the Law of Nature to provide for 'em.

4. Neither are we obliged to maintain our *Children* of the *first* Degree only, but those of the *second* too; and even *beyond* this, if the Case be so: This is what *Justinian* informs us of, when he declares, that for *Nature's* Sake we ought to provide not only for our *Sons*, but for those who come after them, and this extends to such also who are descended from us by our *Daughters*, if they have no other Maintenance.

V. In a
Succession
Children
are pre-
ferr'd to the
Father and
Mother of
the De-
ceased, and
why.

V. 1. *Children* too ought to support their *Parents*; a Duty this, not only conformable to the Laws; but authoris'd by a common Proverb, (g) ἀντιπαλαργεῖν, *Do as the Storks do, return the Kindness you your selves have receiv'd*; and we find that *Solon* is highly applauded for setting a *Mark of Infamy* upon such Persons as refused to do it. But this Obligation is not altogether so common as that which we have instanc'd concerning *Children*, for they, when they come into the World, bring nothing with them for their Maintenance and Support; and not only so, but their Continuance here is generally longer than that of their *Parents*; and therefore as *Honour* and *Obedience* are due to *Parents*, and not to *Children*; so are *Education* and *Entertainment* rather due to *Children* than to *Parents*:

(g) 'Αντιπαλαργεῖν.] See *Leo* After B. 9. de *Nestor*.

rents: And in this Sense it is that I understand that of *Lucian*, *ἡ τὰ γὰρ ἢ φύσις* &c. *Nature does rather injoin Parents to love their Children, than Children to love their Parents.* And that of *Aristotle*, *μᾶλλον συνωκεῖν* &c. *That which begets is more tender and indulgent towards that which is begotten, than that which is begotten is towards that which begets it; for nothing can be so much our own as what derives its Being from us.*

2. Hence it is, that without any regard to the Civil Law, the first Succession to ones Effects devolves on the Children, because that Parents are supposed to be willing not only to supply 'em, as being Parts of themselves, with meer Necessaries only, but also to make such a plentiful Provision for 'em, as shall render their Lives more comfortable and happy; and especially at a time when they can no longer enjoy their Estates themselves. *Natural Reason*, says *Paulus the Civilian*, is as it were a silent Law, that entitles Children to the Inheritance of their Parents, calling them to a Succession which is their Right and Due; but, as *Papinian* observes, (b) Parents cannot claim such a Right to their Children's Estates, as Children can to the Estates of their Parents; for 'tis only from a Principle of Pity and Compassion, that Parents are admitted to their Children's Effects: Whereas 'tis the common Voice of Nature, as well as the Universal Desire of Parents, that Children should inherit

(b) Parents cannot claim such a Right to their Children's Estates, as Children can to the Estates of their Parents.] *Philo* in his 3d B. of the Life of *Moses*, *ἐπειδὴν ὁ νόμος φησὶν ὅτι* &c. Since 'tis the Law of Nature, that Children should be Heirs to their Parents, and not Parents to their Children, he has passed this Case over in Silence, as Ominous and Unlucky, and what no one could ever desire. And *Xenophon*, B. 11. *Σωκράτης ὁ μὲν ἀνὴρ* &c. A Man provides before-hand for his Children who are not yet in Being but may some time or other come; all things that he thinks they will have occasion for, and these too in the most plentiful manner he is able.

inherit what they leave; that is, the Estate goes to the Children, partly from a fix'd *Obligation* in Nature, and partly from the Natural *Conjecture* that Parents would have their own Children to be as handsomly provided for as possible. *He did the Honour to his Blood*, says *Valerius Maximus*, speaking of *Q. Hortentius*, who tho' he was not so well satisfied with his Daughter's Conduct, had yet declar'd her his Heir. And to this purpose is that of *St. Paul* the Apostle, $\epsilon\gamma\omega\ \delta\epsilon\ \phi\epsilon\iota\lambda\epsilon\iota\ \&c.$ Children ought not to lay up for the Parents, but the Parents for the Children.

VI. The Original of that Succession call'd a Representation, where one Person comes in the room of another who was Deceas'd before.

VI. And now, because it is usual for the Father and Mother to take care of their Children, therefore while they live, the Grandfather or Grandmother are thought to be under no Obligation of providing for 'em: Yet if they, or either of them die, 'tis then but reasonable, that the Grandfather or Grandmother should, in the stead of their deceas'd Son or Daughter, take care of and provide for their Grand-sons or Grand-daughters: And this Duty does also, by a Parity of Reason, extend to Parents that are still farther remov'd. And hence has that Law its Original, which entitles (i) the Grand-child to succeed in the Father's room, as *Ulpian* expresses it. *Modestinus* term'd it, $\dagger\ \tau\epsilon\ \omega\alpha\lambda\epsilon\gamma\varsigma\ \&c.$ To fill up the place of the dead Father. And *Justinian*, $\dagger\ \omega\alpha\lambda\epsilon\phi\alpha\nu\ \upsilon\pi\epsilon\iota\sigma\tau\epsilon\iota\lambda\alpha\iota\ \tau\alpha\ \xi\epsilon\iota\nu,$

10

(i) The Grand child to succeed in the Father's room.] Therefore the Hebrews say, The Son, tho' in his Grave, succeeds; and our Sons Sons are as good as Sons. This is taken notice of by *Jacchides*, on *Daniel*, v. 2. as a Right of Nature. And *Justinian*, *Tit. Institut. de Hereditatibus quæ ab intestato deferuntur* says it appears highly just and reasonable, that Grand sons and Grand daughters should in the Father's room inherit. *Eginhardus*, in his Life of *Charles the Great*, ascribes this to Pity and Goodness. And *Michael Attaliata* has told us, $\kappa\alpha\lambda\iota\sigma\tau\alpha\varsigma\ \epsilon\iota\varsigma\ \dagger\ \iota\delta\iota\upsilon\ \gamma\omicron\nu\epsilon\iota\omega\varsigma\ \tau\acute{o}\pi\omicron\nu\ \upsilon\pi\epsilon\iota\sigma\tau\epsilon\lambda\theta\epsilon\iota\nu,$ That each of 'em came into his own Father's place.

to come into the Father's Rank. *Iseus* in his Oration, where he speaks of *Philoctemon's* Estate, calls this *ἐκτασίαν*, to enter upon again. And *Philo* the Jew, *ויאמר יד* &c. For the Grand-Children, their Fathers dead, supply the place of Sons to their Grandfather. And this kind of *Vice-Succession*, (k) which puts a Man upon a level with those Relations who are in the same Degree as his Father was, our Modern Civilians are pleas'd to call a *Representation*, where the Children represent the Persons of their Parents. And that this Law was also valid amongst the *Hebrews*, is sufficiently prov'd from the Division of the promis'd Land to *Jacob's* Sons. For as my Son and my Daughter are the nearest related to me, so next to them are those who are born of 'em, as *Demosthenes* shews in his Oration against *Macartatus*.

VII. What we have hitherto said of the Right of *Succession*, by making a *Conjecture* at the Will of the *Intestate*, holds good, unless there appear some certain and evident Signs of his having chang'd his Mind; amongst which Signs was first what the *Greeks* styl'd an *Abdication*, an *Abandoning* or publick *Renouncing* of the immediate Heir, and then (l) what was practis'd amongst the *Romans*, term'd a *Disherison*; yet in such a manner, that if the Person so disinherited did not by his Crimes merit Death; he had, for the Reason above-mention'd, as sufficient Maintenance allow'd him.

VII. of
Abdication
and Dishe-
rison.

VOL. II.

M

VIII. But

(k) Which puts a Man upon a level with those Relations who are in the same Degree as his Father was.] Thus when the Cities were to be divided by Lot amongst the Posterity of *Hercules*, *Proclus* and *Eurysthenes*, as descending from *Aristodemus*, had one Chance against *Temenus* and *Ctesiphon*. This is mention'd by *Apollodorus*, B. 2. *Pausanias* Corinthiac. *Strabo* 8.

(l) What was practis'd among the Romans, term'd a *Disherison*.] See *Baba Kama*, ch. 9. §. 10. See below §. 25.

VIII. of
the Right of
Natural or
Illegitimate
Children.

VIII. 1. But this almost universal *Rule* is not without *one* Exception, that is, if it does not sufficiently appear, that such a Child was begotten by such a Father; tho' in reality there are no Facts of this Nature that will admit of any Proofs that are certain and conclusive; but as for such things as are done in the Face of the World, they are evidenc'd by the Testimony of the Witnesses then present. 'Tis in this Sense that 'tis said there's a certainty for the *Mother* of the Child, because there are some Persons of both Sexes to be found, that can attest that they assisted at its Birth and Education. But 'tis impossible to have such an *Affurance* of the *Father*. And this *Homer* intimates, when he says,

Οὐ γὰρ πῶ τις ἑὸν γένε' αὐτὸς ἀνέγνω.

No Body his own Rise e'er perfectly knew.

And *Menander* after him,

Αὐτὸς γὰρ ἑδ' εἰς οἶδ'ε πῶς ἐγενάτο.

No Man can tell himself how he was born.

And again in another place,

Ἐστὶν ὃ μήτηρ φιλοτεχνᾷ &c.

*The Mother's more Indulgent, 'cause she knows
What Fathers only can at best suppose.*

And therefore recourse was to be had to some other means, whereby the Father of every Child might be probably discover'd. And this means was *Marriage* taken in its natural Terms, that is, such a *Cohabitation* as plac'd the *Woman* under the Care and

and Custody of the *Man*. But indeed if it does in any other manner appear, that such a *Man* is the *Father* of such a *Child*; or if the *Father* shall only acknowledge such a *Child* to be his; that *Child* shall then as properly inherit, as any other whatever; and why not, when we see that (*m*) meer Strangers being once adopted, are allow'd to succeed by a bare Conjecture only of the Deceased's Inclinations?

2. But our *natural* Issue too, tho' distinguish'd by *Law* from such as are *Legitimate*,

(Τὸν γυναικῶν ὃς ἐστὶν ὅτις ἐκδοῖται
Νόμῳ νόθῳ.

*For tho' nothing inferior to our lawful Sons
They're Bastardiz'd by Law.*

as said *Euripides*) may however be adopted, unless some particular *Law* do prohibit it. And this was granted formerly by the *Roman Law* of *Anastasius*; but afterwards, in favour of *Lawful Marriage*, the means of making 'em equal to such as were *Legitimate*, was render'd more difficult, either by obliging 'em to offer themselves to the *Court*, or the *Father* to marry the *Mother*. Now we have an Instance of this ancient way of Adopting *Natural Children* in the case of *Jacob's Sons*, who by their *Father* were put upon an equal Foot with the Children of the *Free Women*, and came in for an equal share for his *Estate*.

3. On the other Hand, it may sometimes so happen, that not only by vertue of a *Law*, but by

M 2

some

(*m*) Meer Strangers being once adopted.] Or a Grandson, as his Grand-children *Ephraim* and *Manasse* were by *Jacob*.

some particular *Agreement*, (n) such Children as are born in *Wedlock* shall have no more than a Maintenance, or at least be excluded from the *Bulk* of the Estate. Now a Marriage that was contracted in this manner, notwithstanding it was with a *Free Woman*, was what the *Hebrews* called *Harlotry*; such as was that of *Abraham* with *Keturah*, who was called his *Concubine*, whose *Children*, as also *Ishmael* the Son of *Agar* his Bond-maid, receiv'd some few *Presents* or *Legacies* for their *Portions*, but came in for no share at all of the *Paternal* Estate. Such a sort of *Marriage* is that which is called a *Morgengabic* Wedding: Not very different from which are those *second* Marriages (o) in *Brabant*, where the Children by a second Wife have no Property in that Estate, which the Father held at the Death of the former.

IX. Upon failure of Issue and where there's no Will nor express Law, the Ancient Estate and Effects must return to them from whom they at first came, or to their Posterity.

IX. 1. But where there are no Children on whom a Man's *Estate* should naturally devolve, 'tis not so easie to determine the Affair, neither do the *Laws* vary in any one point so much as they do in this particular. All which difference may, notwithstanding, be for the most part referr'd to these two Heads: The *first* whereof respects the *Proximity* or *Nearness* of *Blood*, the *latter* will have the *Effects* return from whence they originally came, and this is usually signify'd by the *Father's Effects* to the *Father's Relations*, the *Mother's* to the *Mother's*. And here we should distinguish betwixt (p) an Estate

(n) Such Children as are born in *Wedlock*, shall have no more than a Maintenance.] As formerly all the Sons, but the *Eldest*, in the Countries belonging to *Mexico*.

(o) In *Brabant*] See such another Law of the Ancient *Burgundians*. B. 1. tit. 1. n. 2.

(p) An Estate that comes from Father and Grand-father.] The *Hebrews* call'd this *יְרֵמָה*.

Estate that comes from *Father* and *Grandfather*, (as was usually express'd in the Form that cut off the *Extravagant Son*) and (q) one that is newly purchas'd; that, in the former, this Passage of *Plato* may take place, ἐγὼ δὲ νομοθέτης &c. *I who am a Legislator, do pronounce that neither your Persons nor your Patrimony are wholly yours, but belong to all the whole Race of you, as well that which has been, as that which is still to come.* And therefore *Plato* is for having κληρογ πατρῶν, the *Paternal Estate* secur'd to that Family from whence it came; which I wou'd by no means have so construed, as that a Man has not a *natural Right* of disposing of such things as came to him by his *Ancestors*. (For oftentimes to relieve a *Friend* in mean and unhappy Circumstances, is not only commendable, but highly necessary.) But that it may appear what in doubtful Cases we should most naturally suppose to be the *Design* and *Intentions* of the *Intestate*; for we on all hands allow, that he who *dies*, has a full Power to dispose of his *Estate*, and whatever *Effects* he is possess'd of.

2. But since a Man when he is once dead can no longer retain any *Right* or *Property* in what he had, and since we take it for granted that he wou'd be

M 3

unwil-

(q) One that is newly purchas'd.] Styl'd by the Hebrews, הורג. See this Distinction in the *Burgundian Law*, B. i. tit. i. n. i.

(r) For oftentimes to relieve a Friend in mean and unhappy Circumstances, is not only commendable, but highly Necessary.] *Seneca de Beneficiis*, B. iv. ch. ii. Don't we, when we find our selves declining, and Death come on apace, make our Wills, and do several Good Offices, which can never be requited Us? How much Time is spent in considering, how long are we secretly pausing, how much and to whom we shall give? Though what does it signifie who has it, when no Body can ever make us any Return? And yet never do we give with greater Caution, never do we rack our Judgments more, than when, without any Prospect of Interest or Convenience to our selves, we have nothing in View but what is Fair and Honest.

unwilling to lose the Opportunity of doing the *Favour* that's in his Power, let us now see what is the most natural Order by which we cou'd suppose such *Favours* might be conferr'd. *Aristotle* well observes; ἐνερπὲν ἀνταποδοτεόν &c. we should rather return a *Kindness* to our *Benefactor*, than oblige a *Friend* with a new one. And *Cicero* says, no *Duty* is more *Necessary* than *Gratitude*. And again, *Whereas* there are two kinds of *Liberality*, the one that inclines us to do *Good*, and the other to requite it; 'tis in our own Power to do a *Piece* of *Service* or not to do it; but an honest Man can never be allow'd not to requite a good Turn, whenever he can, without injuring any other Person. So *St. Ambrose*, The *Value* and *Esteem* which you have for your *Benefactor* ought to be greater than that for any other Person. And presently after, for what is so contrary to a Man's known *Duty*, as not to repay what he has receiv'd? Now one may be grateful either to the *Living* (f) or to the *Dead*. To the *Dead*, as *Lysias* has shewn in his *Funeral Oration*, when we do kind Offices to their Children, who are naturally the surviving Part of their Parents, and to whom, were their Parents living, they wou'd themselves have passionately desir'd us to have been most particularly *Indulgent*.

3. And this was that *Equity* which those Persons who compil'd the *Justinian Laws*, Men who had the greatest regard to *Justice* imaginable, did plainly follow in the Question, about *Whole* and *Half*

(f) Or to the *Dead*.] Thus one in *Procopius*. Pers. i. who was going to hazard his Life, τα πατρίᾳ ὡφελόν, ὡφελήσεις ἐμὴ. What-
 ever *Kindness* you shall shew to my Children, you will shew it to me. See
 an Instance of this in *Theodosius*, who requited *Valentinian* the *Younger's*
 Father in the Person of *Valentinian*. *Zosim.* B. iv. By the
 Law of *Moses*, the *Uncle* succeeded after the *Brothers*, as being
 nearer related to the first Possessor than *Brothers Children*. *Numb.*
 xxvii, 11.

Half Brothers; Brothers by the same, both Father and Mother, Brothers by the same Father, but different Mothers; Brothers by the same Mother only, and in some other such sort of Inquiries: ἀδελφοὶ ἀλλήλους φιλοῦσι &c. Brothers, says Aristotle, as they are begotten by the same Parents, do by Consequence love one another, for the same Birth being common to both, makes 'em as it were but the same Persons; So Valerius Max. As the receiving of the most and greatest Favours, is what in the first Place, not only merits but commands our Esteem and Affection, so the having receiv'd 'em together, is what, next to this, ought to be thought the most engaging Circumstance of Friendship. And therefore by the common Right of Nations (as Justin says) one Brother should succeed another.

4. But in case neither that Person from whom such and such Effects have been more immediately receiv'd, is to be found, nor any of his Children; our Gratitude then must extend to those who have next to him the justest Title to it; for Instance, to the *Father* of the Degree above (the *Grand-father*) and to his Children; especially since by this Means we still keep in the same Family, not only of him whose *Inheritance* we are speaking of, but also of him from whom such and such Effects were more immediately deriv'd; so the same *Aristotle* observes, ἀνεψιοὶ δὲ &c. *Cousins and other Relations are united into one and the same Family by their Parents, but some are nearer, some farther off, according to their respective Originals.*

X. 1. But as for such Effects, as were not *Hereditary*, but only newly purchas'd, call'd by *Plato*, περιποίησις τῆς κληρονομίας, the surplus of an Estate, as they lay no Obligation of Gratitude upon us, so all we have to do in this Case, is to see that the Succession be made over to him, whom the deceas'd is suppos'd to have had the greatest Affection for;

X. What has been newly purchas'd goes to the next Relations,

and that is, as 'tis reasonable to imagine, (r) the Person who is nearest related to him. And therefore *Ifeus* says, that 'twas Customary with the *Grecians*, τοῖς ὑψίστοις &c. For the Effects of the deceas'd to pass to the next of Kin, and then adds, τὴν δὲ, τὴν δὴ αὐτοῦ, &c. Why not, for what is more Equitable than that the Estate of one Relation should pass to another? There's a Passage to the same Purpose in *Aristotle*, in his Book to *Alexander*, chap. 11. Nothing could be more, says *Cicero*, for the Support and Preservation of Society, than that we should be the most indulgent and kind to him, who is the nearest related to us. (u) And in another Place he ranks immediately after Children, agreeable Relations; and so does *Tacitus*, Nature it self would have ev'ry Man's Children and Relations the dearest to him; and *Cicero* in another Passage speaking of Relations says, Whatever is Necessary and Convenient for the Support of Life, is in a more particular Manner their due from us; their due, not from any strict and just Claim, but κατ' ἀξίαν, by way of Merit; and again, when he had

(r) The Person, which is nearest related to him.] See *Deut.* xv. 11. xxiii. 7. *Pro.* xi. 17. *Servius* treats of this upon that Passage of the *vith Æneid*.

Nec Partem posuere suis.

Who dare not give, and ev'n refuse to lend
To their Poor Kindred, or a wanting Friend.

Dryden.

Hierocles, ἡ δὲ ἀξία &c. The Respect that's due to Relations must be in Proportion to the Proximity of Blood and Nature, that so after our Parents each of our Kindred may receive so much Regard from us, as their nearness to them gives 'em a Title to. And *Possidius* of *St. Austin*, he saw 'twas Just and Reasonable that the Children, or Parents or Relations of the Deceas'd should rather possess 'em, he means, the Estates, he's discounting of there.

(u) And in another Place.] These two Passages out of *Cicero*, which are cited last, are from the same first Book of his Offices.

mention'd that Love we bear to our *Relations*, he presently adds, *from this Affection it is, that we derive the Testaments and Legacies of dying Men*; and that it is abundantly more Reasonable, that we make over and bequeath our Effects to *Relations* than *Strangers*. And St. *Ambrose* too, 'tis a *Liberal*ity justly commendable (x) not to despise and reject those of your own *Blood and Family*.

2. Now the Succession from a Person *Intestate*, of which we are now treating, is nothing else than a *Tacit Will*, founded on the most natural Conjecture that can be made at the apparent *Intentions* and *desire* of the *Deceas'd*. So *Quintilian* the Elder, in one of his Declarations, *Next to such Persons, as are mention'd in a Will, the nearest Relations have the justest Title*; as they also have, if the *deceas'd* were *Intestate*, or left no *Issue*. And this not merely because it ought in *Justice* to be so, but because such Effects being as it were deserted and without an *Owner*, they can belong to none so properly as themselves. What we have said of *later Purchases*, that they should naturally go to the *next Relations*, will hold equally good in those also that come by *Inheritance*, in case that neither the *Persons* from whence they came, nor any of their *Children* are then in *Being*; because then there is no longer a Possibility of making a *Return*.

XI. 1. But what we have here advanced, tho' highly agreeable to a natural Conjecture, yet is it not of any absolute Necessity from the *Law of Nature*; and therefore very frequently alter'd, according to the various *Humours* of People, either by *Compacts*, by *Laws*, or by *Customs*. In some Degrees they

XI. A Variety of Laws about Succession.

(x) Not to despise and reject those of your own Blood and Family] This is taken from *Is. lvi. 7*. You have some other such Expressions in St. *Chrysostom*, upon *1 Cor. iv. 7*. and St. *Augustin*, *de doctrina Christiana*, B. ii. 12.

they admit one Person to succeed in another's Room, (2) in other Degrees they won't; in some Places they consider from whence the Estates came, and in others they mind no such Thing; in some Countries the *Eldest* has a larger Share than the *Younger*, as among the Jews, and in others the Children have all alike; with some, Preference is shewn to the *Father's* side, with others those of the *Mother's* side are upon a level with 'em; some have a particular Regard to the *Sex*, and others have none at all; with some the nearest Relations only are allow'd of, with others the more *remote* ones are not excluded. But to enter into the Detail of all these, as it would be extremely tedious, so would it be far from agreeable to our present purpose.

2. 'Tis proper however to observe here, that where the decess'd has never done any Thing to signify his *Will*, that the Succession must in this Case be wholly determin'd by the Laws and Customs of that particular Place, and this not only by vertue of a *Prerogative* in the *Government*, but from a *Conjecture* drawn from thence; which *Conjecture* also is in Force, in regard to those Persons in whom the Supream Power is lodg'd. For 'tis but reasonable to believe, that whatever they either approve by Custom, or have establish'd by Laws among their Subjects, they think equally just

(2) In other Degrees they won't.] The Ancient Customs of the Germans knew nothing of any such Representation, not even among their Children. *Childebert* was the first who introduced this Right into France by a particular *Edict*; and *Otho* Son of *Henry* brought it up in the Parts on t'other side the *Rhine*, as is attested by *Witbekind*, B. ii. See the *Lombard Law*, B. ii. tit. xiv. 18. And the old Scots Right of Succession took no Notice of any thing but the nearness of the Degree; see *Pontanus Danic.* 7. Where he relates that it was so declared by the King of England, who was made *Umpire* in this Affair.

just in their own Affairs; such Affairs, I mean, in which they themselves can be no ways injur'd.

XII. But as to what relates to the *Succession* of Crowns, we must distinguish betwixt such as are *Hereditary*, and held in an absolute and independent Manner, and such as are limited and receive their Title and Tenure from the Consent of the People. The first sort of Crowns (*a*) may be worn either by a *King* (*b*) or a *Queen*, as we find it was usual, formerly in *Egypt*, and *Great Britain*.

XII. What kind of Succession there is in Patrimonial Crowns.

*Nullo discrimine Sexus
Reginam scit ferre Pharos,*

*Pharos no Distinction makes,
But Male or Female Monarch takes.*

says

(*a*) May be worn by a King] In *Asia* the Brothers reign'd Jointly, only one had the Prerogative of wearing the Crown. Polybius Exc. legation. xciii. And in *Livy*, and the same Polybius, you'll find that *Egypt* was divided amongst the Brothers the *Ptolomies*, *Attalus's* Sons desir'd, that the Nations might be parted among 'em in just and equal Shares, *Jornand. de Rebus Gothicis*. *Gregor. B. vii.* speaking of *Irene* the Wife of *Andronius Palaeologus*, τοῦ ἡγεμονιστοῦ Exc. What is still more strange is, that she was not for a Monarchy, according to the Original Form and Constitution of the Romans, but as it was the Western Practice, would have their Cities and Countries shar'd amongst her Sons, that each of 'em might have a separate and independent Government to himself, as if they had been so many distinct Crowns deriv'd to 'em as their proper and Paternal Inheritance, in the same manner as ordinary Persons come to their private Estates and Possessions, and so to descend to their Children and Successors after 'em. For she her self being of Western Extraction, had a Mind to bring up here that new and unprecedented Custom she had receiv'd from thence.

(*b*) Or a Queen, as we find it was usual, formerly in *Egypt*, and *Great Britain*.] Of *Alexander* and *Laodice*; see Polybius Exc. legat. xciii. Of *Aulus's* Daughter, *Strabo* xvii. *Arrian* (ἀρριανός) relates, that several Women reign'd in *Asia* after *Semiramis*. So *Nicoeris* in *Babylon*, *Artemisia* at *Halicarnassus*, *Tomyris* among the *Scythians*. And *Servius* upon the first *Æneid* gives this Reason, because Women govern'd there before. And upon the eleventh *Æneid* he says, that this was a Custom among the *Romuli*.

says *Lucan*: And *Tacitus* of the Britons, nor do they make any Difference of Sex in their Government. And adopted Sons are no less capable of succeeding than Real ones are, by a Presumption that it was the desire of the deceased Prince that it should be so; thus did *Hyllus*, the adopted Son of *Hercules*, succeed *Æpalius* the King of *Locris*. So *Pyrrhus*, having no lawful Issue, declared *Molossus*, (c) his Natural Son, his Successor to the Crown of *Epirus*; so King *Ateas* endeavour'd to adopt *Philip* in order to succeed him in *Scythia*; and so *Jugurtha*, though a Bastard, succeeded in the Kingdom of *Numidia* by Adoption. And we read too, that Adoption was received in those States, which were conquered by the *Goths* and *Lombards*. Nay, the Crown shall descend to the last Prince's Relations, though not at all of the Blood of the first King, if such a Succession be Customary in those Places; thus does *Mithridates* in *Justin* declare, that the Kings of *Paphlagonia* being all dead, the Right of Succession did belong to his Father.

XII. If such Govern-ments are not to be divided the Eldest is to be preferr'd.

XIII. But if it be expressly said, that a Kingdom shall not be divided, and at the same it be no ways declar'd to whom it shall go, (d) the Eldest then,

(c) *His Natural Son.*] Among the *Tartars* Natural and Legitimate Sons are upon an equal Foot. But *Herodotus* says of the *Persians*, ὅδ' οὐδ' ὁ βασιλεὺς ἑὶς βασιλεύει, ὅταν ᾖ πατρὸς υἱός. they never let a Natural Son have the Crown, if there's a Legitimate one in the way; two *Vandals* reign'd in *Spain*, *Gontharis* who was Legitimate, and *Zigerich* the Base-born Son of *Godigiselus*, as *Procopius* reports; according to the old Custom of the Northern Nations, testify'd by *Adam Bremen*. Hist. Eccles. c. 106. *Helmold*, Slavic. lib. I. c. 51. and 52. And *Michael* a Natural Son, the Lawful Issue failing, succeeded *Michael*, Despot of *Thessaly*, *Gregor*. B. ii. And he also was succeeded in Part by his Natural Son; *Gregor*. B. iv. See *Servius* upon the 3d *Æneid* about *Molossus* *Pyrrhus*'s Bastard Son.

(d) *The Eldest then.*] Concerning the *Swedes*, see *Brigitt*, iv. 3. the.

then, whether Son or Daughter, shall undoubtedly enjoy it. We read in the *Talmud* Title of *Kings*; *he that has the best Claim to the Right of Inheritance has also the best Title to the Crown; and therefore in this Case the Eldest Son is preferable to the Younger*, νομιζόμενον πρῶτος &c. says *Herodotus*, 'Tis the Custom of all Nations for the Eldest Son to sit upon the Throne. And in other Places he frequently terms this, νόμον, the Law and Practice of Kingdoms. So *Livy* speaking of two Brothers *Savoyards*, that contended for the Crown says, that the Younger had least Right but most Power. In *Trogus Pompeius*, *Artabazanes* who was the Eldest laid a Claim to the Crown by a Prerogative of Age; a Prerogative, which both the Order of Birth, and Nature too her self, had invested all Nations with; and this he elsewhere styles the Law of Nations; as *Livy*, who terms it the Rank and Privilege of Age and Nature; but this is only to be understood where nothing to the contrary has been order'd by the Father, as was done by *Ptolomy* in the same *Trogus*. But whoever comes to a Crown in this Manner, is oblig'd, if, and as far as, it can be done, to make those who had a Title to it as well as he, a very Handsome and Honourable Allowance for their Shares.

XIV. But

the Danes, Saxo xii and xiii. *Appian*. *Mithridatic*. δικάζοντα τὴν ἀρετὴν ἀρχεῖν, thinking it Just that the Elder should enjoy the Crown. *Nicetas Choniates* in his Life of *John Comnenus*, ἡ φύσις τοῖς ἀρετῶσι &c. Nature, following her own Order, uses to give the chiefest Honour in Favour of the First-born. But God does not think fit in the greatest of Prerogatives, always to observe this Rule. And in his Life of *Manuel* speaking of *Isaacius*, τὸν γενέσθαι εἰς τὴν διαδοχὴν τῆς βασιλείας κατὰ φύσιν, call'd by Birth Right to the Succession of the Crown. (And *Antipater* in *Josephus* said, that the Kingdom was *Hyrcanus's* by Eldership. See *Leunclavius* *Turcic*. xvi.

XIV. In
Case of any
Dispute, the
Kingdom,
that is no
otherwise
Hereditary
than by the
People's Con-
sent, must
not be divi-
ded.

XIV. But as for those *Kingdoms* which are no otherwise *Hereditary* than by the *Free Consent* of the *People*, the *Succession* is in this Case to be settled in that Manner only, as may be presum'd the *People* shall most readily agree to; now 'tis suppos'd that the *People* will always consent to whatever shall appear to be for the publick Advantage. And hence our first Inference is, that a *Kingdom* should always remain *undivided*, (e) unless the *Laws* or *Custom* of the *Place* be against it, (as at *Thebes* in *Bœotia*, the Government was *divided* amongst the *Male Heirs*, as appears by the *History* (f) of *Amphion* and *Zethus*, and also by that of the *Sons* of *Oedipus*; and the ancient *Attica* was parted among the *Children* of *Pandion*; and the Country about *Rhodes*, between the *Brothers*, *Camirus*, *Jalyfus* and *Lindus*, and the Kingdom of *Argos* among *Perseus's* four *Sons*,) for, that it should remain *entire*, is certainly more expedient, not only for the *Preservation* and *Security* of the *Crown*, but also for the maintaining the *Concord* and *Unanimity* of the *Subjects*. Accordingly 'tis observ'd

(e) Unless the *Laws* or *Custom* of the *Place* be against it] *Dardanus* and *Laïus* sat jointly on the *Throne* of *Troy*. *Servius* upon this Passage of the 3d *Æneid*: *Sociique Penates*. In *Crete*, *Minos* and *Rhadamanthus*; *Julian* against the *Christians*. At *Alba*, *Numitor* and *Amulius*, as says the *Writer* of the *Lives* of *Illustrious Men*. For others relate that *Numitor* had the *Money*, and *Amulius* the *Crown*, of this Number is *Plutarch*: in the same manner as some have reported, that the Kingdom of *Thebes* fell to *Esocles's* Share; and to *Polynices*, in the lieu of that, *Hermione's* Jewels. Thus in *Norway*, one has the *Crown*, and another the *Shipping*, and the *Prospect* of *Advantage* from *Sea Expeditions*.

(f) Of *Amphion* and *Zethus*.] *Euripides Hercul. furem*.

Τῷ λευκοπόλῳ περὶ τυραννῆσαι χθονὲς
'Αμφίων' ἠδ' ἐ Ζῆθον ἐκγόνα Δίος.

Before *Amphion* and *Zethus*,
Jove's Great Offspring, Rul'd.

serv'd by Justin, B. xxi. 'Twas their Opinion that the Government would be more secure under the Dominion of one Man, than if it were parcell'd out among all the Sons into several Shares.

XV. Another Inference is, that the Succession should be continued in the first King's Family; for that Family is suppos'd to be elected on the account of its Nobility and Figure; and therefore whenever it became Extinct, the Sovereignty should return to the People as before. So Curtius, B. 10. says, That the Crown should remain in one particular House and Family; that the Blood Royal should have an Hereditary Right to it; that Subjects use to Respect and Reverence their very Name; nor should any fill the Throne, unless he were born to Reign.

XV. Such Crowns continue Hereditary no longer than there are Descendants of the first Prince living.

XVI. The Third, that no Persons should be admitted to the Succession, but such only as were born according to the Laws of the Country; no natural Sons, because they are not only expos'd to Contempt on the Account of their Father's not marrying their Mother, but because 'tis not altogether so certain whose Children they are; whereas 'tis of the last Importance, that Subjects have all the Assurance possible of their Prince's Birth, to avoid all Disputes that may hereafter arise on that Subject: And for this Reason it was, that the Macedonians thought the Crown belong'd more to Demetrius the younger, than to Persus who was Elder, because Demetrius was born in good and lawful Wedlock. And we read in Ovid,

XVI. Natural Children have no Right to the Crown.

*At nec nupta quidem, Tedaq; accepta jugali:
Cur nisi ne caperes Regna Paterna Nothus?*

*Unwedded too ————— in spight,
To Bastardize and Rob thee of thy Right.*

Otway.
Nor

Nor can Adopted Sons be admitted here, because People not only entertain higher Hopes of, but have also greater Reverence for a Person of *Royal* Extraction;

*In Brutes we see what Strength and Fire
Come from a Bold and generous Sire.*

XVII. In such Kingdoms Males are prefer'd before Females in the same Degree of Blood.

XVII. *Fourthly*, That even of those who have the same Pretensions, and seemingly the same Title to the *Crown*, either because they are Relations of the same Degree, or because they both claim in their Parents stead, (g) the *Male* Issue must certainly be prefer'd to the *Female*, as being thought more proper for the burthen and fatigue of War, and better qualify'd for discharging all the other Offices of a *Sovereign*.

XVIII. Among Males the eldest to be prefer'd.

XVIII. 1. *Fifthly*, That not only amongst the *Male* Issue, but also among those of the other Sex, in Default of *Males*, the (h) Preference must always

(g) *The Male Issue must certainly be prefer'd to the Female.*] See Nicetas Choniates in his Life of Manuel, B. 4.

(h) *Preference must always be given to the Eldest.*] Homer speaking of the Crown of Crete, Iliad 13.

Ἡμῶν δ' ἀμφοτέροισιν ἴον γένος, ἢ δ' ἰὰ πάτρην,
Ἀλλὰ Ζεὺς πρῶτον γεγόνει καὶ πλείονα ἦδ' ἐν.

Our Family's the same, our Country too.
But Jove's th' Elder, and therefore sure must know
Much more than I can.

Where Homer very likely, as indeed he usually does, assigns the Reason, why the *Elder* are prefer'd to the *Throne*, a Reason that generally holds good, and that is sufficient in such cases as these, τῷ νόμῳ τῷ πρεσβυτέρῳ τῇ βασιλείᾳ παίδων διδόντ' τὴν τῶν ὀντων ἡγεμονίαν. The Law giving the entire Sovereignty to the Elder of the King's Sons, says Zosimus, B. 2. talking of a Law of the Persians. Periander succeeded his Father in the Kingdom of Corinth, καὶ αὐτὸς

always be given to the *Eldest*, it being presum'd that he either has, or however, that he will *sooner* have his Judgment Perfected and Ripe for Business. So *Cyrus* in *Xenophon*, το πρεσβύτερον &c. *I bequeath my Crown to my eldest Son, as having, 'tis very likely, a greater Knowledge of the World.* But because this Prerogative of Age is only a Transient Advantage, but that of the Sex perpetual; therefore is the Prerogative of Sex much more considerable than that of Years. So *Herodotus*, when he had related that *Andromeda's Son Perses* succeeded *Cepheus* in the Kingdom, assigns this Reason, ἐτύχαιε &c. *For Cepheus had no Male Issue.* And, having no Sons, ἀπαὶς ὦν ἀρρέων, as *Diodorus* informs us, *Teuthras* left the Crown of *Mysia* to his Daughter *Agione*. So *Trogus* tells us, that the Empire of the *Medes* belong'd to his Daughter, because *Astyages* had no Male Heir. So doth *Cyaxares* in *Xenophon* declare, that the Crown of *Media* was his Daughter's, οὐ γὰρ ἔστι &c. *For, says he, I have no Son who is Legitimate.* And *Virgil*, speaking of King *Latinus*,

*But this old peaceful Prince, as Heav'n decreed,
Was bless'd with no Male Issue to Succeed:
His Sons in blooming Youth were snatch'd by Fate;
One only Daughter Heir'd the Royal State.*
Dryden.

So before the Reigns of the *Heraclidae*, *Sparta* his Daughter, or her Children, succeeded *Eurotas* in *Laconia*, as *Helena's* Children did *Tyndareus*, because there were no Males: And his Uncle *Atreus* succeeded *Eurystheus*. So in the Kingdom of *My-*
VOL. II. N cence,

καὶ ἀπρεσβείον, by the Right of Eldership. So *Nicolaus Damascenus* informs us in the *Collections* we have by the Hands and Favour of that Excellent Man *Nicolaus Petresius*.

come, as *Thucydides* observes. By the same Right, the *Crown* of *Athens* devolv'd (i) on *Cleusa*, and that of *Thebes* on *Antigone*, for want of Male Issue. And the *Crown* of *Argos* upon *Argus*, *Phoroneus's* (k) Grand-son by his Grand-daughters. 12. From whence too we are to understand, that tho' Children do in some Degrees supply the Places of their Parents before deceas'd, yet this is only to be allow'd of, when they are as capable to succeed as any of the Rest; and here too, where Persons are thus capable, first the *Prerogative* of Sex, and then that of Age, must always be regarded and maintain'd. For the Quality both of Sex and Age, it is look'd upon in this case by the People, is so fix'd and inherent in the Person, as not to be separated from it.

XIX. Whether such a Crown be part of the Inheritance.

XIX. Here it may be ask'd, whether a *Crown* thus convey'd be a part of the *Inheritance*? The more probable Opinion is, that it is (l) a kind of an *Inheritance* itself, but distinct from that of other Effects. Such peculiar *Inheritances* there are in some *Manors*, in a *Copy-hold Estate*, in the Rights of *Patronages*, and in what we call a *Jointure*. Whence it follows, that the *Crown* may belong to him, who if he will, may be *Heir* too of the other Effects, yet so, that he may enjoy the *Crown* without either the Effects, or their *Incumbrances*.

The

(i) On *Cleusa*.] See *Euripides* in his *Ione*.
 (k) Grand-son by his Daughter.] And had *Orestes* died without Issue, *Electra* had succeeded him in the same Kingdom of *Argos*, as we learn from *Euripides's Taurica Iphigenia*. So the *Crown* of *Calidon* came to *Andramon*, *Oeneus's* Son-in-law, *Asterius's* *Crown* to his Son-in-law *Minos*, as *Apollodorus* tells us, and subjoins this Reason for it, because there was no Male Issue.

(l) A kind of an *Inheritance* it self.] Innocent the Third was of Opinion that the Succession to such a *Crown* might be lost by him, who did not take care to execute the Last Will of the Deceas'd. c. licet de voto.

The Reason is, because it is supposed, that the People would have the Crown descend by the *clearest* and most *unquestionable* Title that can be: Neither is it any thing at all to them, whether the *Prince* accepts of the *Inheritance* or not, since it was not upon this account that they made choice of an *Hereditary* Order in *Succession*, but that his Title might be beyond dispute, and he the more *Reverenced* in regard to his *Royal Blood*, and that from his *Family* and *Education*, something very particularly Great and Noble might be expected in him, and that the *Prince* himself in Possession might be the more *careful* of his *Kingdom*, and defend it with the greater *Courage* and *Resolution*, knowing that he was to leave it to them, whom he highly esteemed, either out of *Gratitude* or *Affection*.

XX. But where the Custom of Succession is different as to *Free-holds* and *Copy-holds*, if the Kingdom be not *Feudatory* (held of another in *Fee*) or was not so at first, tho' Homage hath been since done for it, yet shall the *Succession* by the Law pass in the same manner as that of *Freeholds* did, at the first Institution of the *Kingdom*.

XXI. But in those *Kingdoms*, that were at first given to be held from another, as the *Chief Lord*, the Law of the *Succession* shall be the same as in *Copy-holds*, not always indeed according to that of the *Lombards*, which we have borrow'd of 'em, but what was received in every Nation, at the first *Investiture*. For the *Goths*, *Vandals*, *Huns*, *Franks*, *Burgundians*, *English*, *Saxons*, and all the *German Nations*, which by War possess'd themselves of the best Parts of the *Roman Empire*, have every one of 'em their own Laws and Customs concerning things held in *Fee*, as well as the *Lombards*.

XXII. 1. But there is another kind of Succession much used in some Kingdoms, not *Hereditary*,

XX. 'Tis to be presum'd that the Succession to the Crown is such as was usual in Successions to other Effects, at the time when that Kingdom first began; whether the Crown was *Free-hold*;

XXI. Or held in *Fee*.

XXII. What a *Lineal* Succession is, and how the Right is in that case transmitted.

but what they call (*m*) *Lineal*, in which is observed, not that *Right* which is term'd *Representative*, but a *Right* of transmitting the *future* *Succession*, as tho' it were *already* descended; and this by a *Law* grounded on *Prospect* and *Expectation* only, which *Prospect* and *Expectation* can *naturally* and *of it self* do nothing, but does however in this case occasion a sort of *real Right*; such a *Right* as one has (*n*) to things due from a *Conditional Stipulation*, so that this very *Right* necessarily passes to the *Descendents* of the first King, but in an *Order* that is fix'd and certain; and therefore in the first place the *Children* of the last *Possessor* of the first *Degree*, as well those who are *Alive*, as those who are *Dead*, are to be admitted, with *Respect* had, as well among the *Living*

(*m*) *Lineal*.] See *Cardinal Eusebius* pract. concl. 88. Verb. *Regni Successio*: *Guil. de Montiserrat. de Succession. Reg.* His Book is in the *Ocean. Juris. Peregrin. de jure Fisci.* l. 1. tit. 11. n. 44. and l. 5. tit. 1. n. 109. See Instances of such a *Succession* in the Kingdom of *Norway*, in that Learned and most Industrious Author *Joh. Pontan.* Hist. Danic. 9. *Consuet. Norman de Propinquior. Harid. Joh. Serran.* in *Ludov. Grass. super. Contr. Bonon.* *Argentæus Hist. Brit.* l. 6. c. 4. In *Successions*, the *Eldest Children*, whether *Males* or *Females*; and in case these *Eldest* die without *Issue* of their own Bodies begotten, then the *Issue* of the next *Elder* do in a *Succession* on to *Fees*, by *Right of Primogeniture*, represent the Persons of their *Fathers*, and come to such *Rights of Succession* and *Primogeniture*, in the same manner as their *Fathers* would do were they living by excluding their *Uncles* according to a general and known Custom observ'd, as well in *Successions* by the *Right Line*, as by the *Collateral*: And from the aforesaid Use and Custom, a *Daughter* Succeeds in *Fees*, whether *Dutchies, Earldoms, Peerages, or Baronies*, how Great and Noble soever; and this is what was practis'd too in *Artois, Champagne, Tholouse, and Bretagne*. Such an *Order of Succession* was prescrib'd the *Marquisate of Mantua*, by the Emperor *Sigismund*, Anno MCCCCXXXII. and by the Emperor *Charles V.* and *Philip II.* in their Respective Kingdoms and Governments, Ann. MDLIV. and MDXCIV.

(*n*) *To Things due from a Conditional Stipulation*.] As it is in *Legacies*, where if the *Legatees* die, the *Legacy* is never paid.

Living as the *Dead*, to the *Sex* first, and then to the *Age*. And if the Right of Succession be in the *Deceased*, it shall pass to such as are *descended* from them, observing again the *Pnerogative* of *Sex*, and then of *Age*; always transmitting the Right of the *Dead* to the *Living*, and of the *Living* to the *Dead*. Upon failure of *Children*, then it descends to those who either are *nearest* related, or if they had liv'd, would have been so, observing still the same *Transmission*, and among *Equals* of the same *Line*, the same Distinction of *Sex*, and *Age*, but so as not to pass from one *Line* to another, on the account of *Sex* and *Age*. And consequently the *Daughter* of a *Son* should be prefer'd before the *Son* of a *Daughter*; and the *Brother's* *Daughter* before the *Sister's* *Son*; an *Elder* *Brother's* *Son* before a *Younger* *Brother*; and so on. This is the Order of Succession to the Crown of *Castile*, and so is the Succession of *Baronies* in that Kingdom settled too.

2. But the Proof of this *Lineal* Succession, if there were neither *Law* nor *Example* for it, might be taken from the Order that is observed in publick Assemblies. For if Regard be had there to *Lineal* Descents, 'tis an Evidence that what was *Hope* and *Expectation* only, may by *Law* be quicken'd into a just *Right*, and that this *Right* may pass from the *Dead* to the *Survivors*. Now this is that Succession in the *Mother's* *Line*, where *Females* and their *Children* are not *excluded*, but only *postponed* in the same *Line*, so that if in case the *nearer* Relations, or the *Males* who are in other respects equally Related, or the *Descendents* of those *Males* should fail, then the Succession returns to them. Now the Foundation of this Succession, as it differs from an *Hereditary* one, is the *Hope* and *Expectation* of the People, that those who have the justest Pretensions to the *Crown*,

will have the best of *Educations*; such are those whose *Parents* would have succeeded, if they had lived.

XXIII.
What the
Lineal Ag-
natic Suc-
cession is.

XXIII. There is also another *Lineal* Succession, the *Agnatic*, a Succession in the *Father's* Line, of *Males* only who are descended of *Males*, which taking its *Original* from a Custom in the *Illustrious* Kingdom of *France*, is therefore commonly called (o) the *French* Succession. This differs from the Succession in the *Mother's* Line, in that it was principally designed to exclude *Females*, to prevent the *Crown's* passing into a strange Family by the Marriage of the *Daughters*. In both these *Lineal* Successions, all are admitted who are any ways *Related*, tho' in the most remote Degrees from the last Possessor, if they can but derive themselves from the first King. But (p) in some Places, where the Succession in the *Male* Line fails, they allow that of the *Female* in its Room.

XXIV.
A Successi-
on that al-
ways re-
gards the
nearest in
Blood to the
first King.

XXIV. (q) Other Methods of Successions may also be introduced, either at the Pleasure of the People,

(o) The French Succession. An Ancient Testimony of the French Custom you have in *Agathias*, B. 11. And after *Solomon*, the Succession in *David's* Family was the same. See 2 *Chron* 20. 3.

(p) In some places where the Succession in the Male Line fails, they allow that of the Female in its Room. As in the Province of *Narbonne*. See *Sextatius* in his Life of *Charles VIII*. 'Twas by such a Law I presume that *Theoderick* dying without Issue, his Sister's Son *Athalaric* Succeeded him. And I am apt to think, that this did formerly obtain in *Armenia*.

(q) Other Methods of Successions may also be introduced. In *Aethiopia* formerly Sisters Sons succeeded their Princes, as *Nicolaus Damascenus* reports. *Beda* observes, that the same was Customary with the *Picts*, and that the Relations by the Woman's side did always succeed. And *Tacitus* speaking of the *Germans*, Sisters Sons had the same Regard from their Uncle, as they had from their own Father. And some look upon this to be the more Sacred and stricter Tie of Blood. *Orosius* and several others inform us that 'tis so among some of the *Indian* People.

ple, or of *Him* who holds the Kingdom by such a *Patrimonial Right*, that he may alienate it if he will; as for Example, he may so settle it, (r) that they who are next to himself in Age, may succeed in the Kingdom; as it was formerly among the *Numidians*, where for the like Reason the *Brothers* of the last King were preferred before his own *Children*. The same was practised in *Arabia Felix*, as we find in *Strabo*; and the Modern Writers tell us the same of *Taurica Chersonesus*; neither is it long since (s) the *African Kings* of

N 4

Fez

(r) That they who are next to himself in Age] This by *Gizerich's Will* prevail'd in *Africa*. *Procop. Vandal. l. 7.* *Exon. 3. l. 2.* *you* *Fi. Geer. & c.* A little while after, *Gizerich*, pretty much advanced in Years, dy'd leaving a Will behind him, in which among other things, he charged the *Vandals* to take Care that the Crown of the *Vandals* should always go to him, who being in the Male Line nearest related to him the said *Gizerich*, was also the Eldest of all such his Relations. *Jornandes*: *Gizerich* reigning a long time, just before his Death, call'd his Sons about him and injoin'd 'em not to quarrel about the Crown, but that each should in his Turn and Degree succeed the other, that is, the Eldest Son should be succeeded by him who is the next Elder, and then he who is next to him should be his Successor. *Victor Vitell. l. 1. 1.* To whom of all the Grand-Sons, as being the Eldest of 'em, the Crown, according to King *Gizerich's* Constitution, did principally belong. Here, 'tis he, who first obtain'd the Kingdom, and not he who last fill'd the Throne, that's all along regarded. Now it is a Question whether *Gizerich* took this way of Succession from *Africa* it self; where we told you in the Text, that it was in force, or whether from some of our Northern People. For among the *Limbards*, tho' King *Vaaces* had left Sons behind him, yet none of them was to succeed him, but *Risul* his Uncle; as is testify'd by *Procopius*, *Goth. 3.* And *Nicetas Choniates de Reb. Manuel. l. 4.* says that when *Faira* was dead, not his Children but his Brother, had a Right to the Crown of *Hungary*. I don't know whether the Method of Succession used by the *Patzinacita*, and obscurely proposed by *Constantine Porphyrogen. de Administrat. Imperii c. 37.* may be referred hither too. *Crantzius Danic. 4.* and *Suedic. 5.* reports, that the same was observed in *Denmark*. So *Julus*, immediately descended of *Ascanius*, *Aeneas's* eldest Son, did not succeed *Aeneas* in *Alba*, but *Silvius* another of *Aeneas's* Sons.

(s) The African Kings of Fez and Morocco] *Livius, of Maximian*: Whilst he was engaged in War for the *Carthaginians* in Spain, his Fa-

Fez and Morocco did so. And that this too is what we must observe, if any Dispute shall happen about any *Grant of Lands*, in *Fee-Simple*, left to a Family, is the more likely Opinion and agreeable to the *Roman Laws*, though some Interpreters wrest it otherwise. These things being premised, it will be easie to decide all Controversies concerning the *Right of Crowns*, which the different Judgments of *Lawyers* have made so intricate and difficult.

XXV.

Whether the Son may be so disinherited, as not to succeed in his Fathers Kingdom.

XXV. The first Question is, whether a *Father* may *disinherit* his *Son*, so that he shall not succeed in his *Kingdom*. Here we must distinguish between *Crowns* which are *Alienable*, that is, are altogether at the *Father's* Disposal, and such as are not *Alienable*. For in *Alienable* ones, no doubt of it, *disinheriting* is lawful, because such *Crowns* do not differ from other *Goods* and *Chattels*; and therefore in such Places, where by *Law* or *Custom*, *disinheriting* is in Force, it is practicable in the case of *Kingdoms*; and though there were no *Law* or *Custom* to countenance it, yet it is naturally (1) lawful for a *Father* to exclude a *Son* from all but bare *Maintenance*, and even that too, if he has

her dies: (his Name was Galba) The Crown went to Detalces, the King's Brother. 'tis the Custom in Numidia. See Mariana, l. 29 who says the same of all Mauniania. From hence among the Saracens, who were come from Africa into Spain Brothers were prefer'd to Sons till Abderamen's Times, Roderic. Tolet. Hist. Arab. c. 6. Thuan. Hist. l. 65. in Ann. 1578. speaking of Hames. He was, by his Father's Will, Entitled in his Turn after his Brothers to the Crown, their Children being quite excluded. And I observe from the Histories of those Places, that this kind of Succession prevailed in the Kingdoms of Mexico and Peru.

(1) Lawful for a Father to exclude a Son,] 'Tis of such a Kingdom that we must understand Baldus, who in his Preface to Gregory's Decretals says, that a Prince may chuse which of his Children he pleases for his Successor. There's an Instance too of this in the History of Mexico.

has committed any *Capital Crime*; or has any otherwise notoriously offended, provided he has any other Method of subsisting. Thus was *Reuben* for his *Misdemeanor* depriv'd by *Jacob* of his *Birth-right*, and *Adonijah* (u) by *David* of the *Crown*. Nay, whoever has done any enormous Crime against his *Father*, unless there shall be manifest signs that he has forgiven him, he shall be reputed as one *Tacitly disinherited*. But in *Crowns* not *Alienable*, tho' they are *Hereditary*, it is otherwise, because the *Hereditary* way is of the People's own chusing; but then 'tis (x) so *Hereditary* as not to be *disposed* of by *Will*. Much less shall *disinheriting* be allowed in a *Lineal Succession*, because in this Case here's nothing like the *Succession* usual in *Private Estates*, but the *Crown*, by the People's Original Donation, passes to every one of the *Posterity* one after another, in the Order prescribed.

XXVI. Another Question is, whether a *King* may *abdicate* his *Kingdom*, or *renounce* his *Right of Succession*? There is no doubt but a Person may renounce for himself; but whether he can for his *Children*, is not so easily determined, but this too is answer'd by one and the same Distinction. For in *Crowns* that are *Hereditary*, he who gives up all his *Right* cannot transfer any thing to his *Children*. But in a *Lineal Succession* the *Father's Act* cannot hurt his *Children* who are already born, because as soon as ever the *Children* are come into the *World*, they acquire a *Right* of their own by *Law*; neither can he affect those that are *to be born*,

XXVI.
Whether a
Prince may
for himself
and his
Children,
abdicate
and re-
nounce all
Title to the
Crown.

(u) By *David*.] For that *Crown* was to *David* *Patrimonial*, as it were, not by the *Right of Conquest*, but by the *Gift* of *God* himself.

(x) So *Hereditary* as not to be *disposed* of by *Will*.] Neither by *Will* nor by *Adoption*. See what *Mariana* says, B. 20. about the *Kingdom* of *Naples*.

born, because the Right entailed upon them by the People's Consent, must in its due time belong to them. Neither does what I have said already concerning *Transmission* contradict this: For that *Transmission* is, as to the Parents, of Necessity, and not left to Will and Discretion. The Difference between the Children born *before* the *Abdication*, and those who are born *after*, is this, those who were born *after* had not then acquired their Right; and therefore it might be taken from them by the *Will* of the *People*, if the Parents too, whose Interest it is that that Right should pass to their Children, shall consent to part with it: To this purpose is what I advanced above concerning *Dereliction*.

XXVII.

Neither
Prince nor
People have
a Right to
pass an Ab-
solute and
Peremptory
Judgment
on the Suc-
cession to
the Crown.

XXVII. 1. There is also another Question, Who shall judge of the Right of Succession to a Crown? Whether the *Prince* then reigning, or the *People*, either by *themselves*, or by *Judges* deputed for 'em? If you mean a *Judgment* by way of *Authority* and *Absolute* Decision, neither of them have any Right to judge: For such an *Authority* cannot be but in a *Superior*, and here Regard must be had not only to the Person, but to the Matter in hand also, which is to be considered with all its Circumstances. Now (y) the Point of *Succession* is not properly in the Power of the *present King*, which appears from hence, for that the *King* now reigning can by no Law *oblige* his *Successor*: For the *Succession* to the *Crown* is not under the Power of the *Crown*, but has all along remained in a *State of Nature*, a *State* that allows of no *Jurisdiction*, or *Authority* at all.

2. Yet

(y) The Point of Succession is not properly in the Power of the present King.] About the Kingdom of France, see *Thuanus*, l. c. 5. Ann. 1593. See also *Guicciardine*.

2. Yet if the Right of Succession be disputed, those who lay a Claim to it would do prudently and well to agree upon *Arbitrators*, of which we shall treat in another place; but as for the People who have transferred all their Power to the *Prince* and the *Royal Family*, whilst that Family continues they cannot pretend to any *Remains* of it. I am speaking of a true Kingdom, and not of some Petty State. But if any Question arise of the *Primary Will* of the People, (2) it would not be amiss to take the Advice of the *People* now in *Being*, for they may be judged to be the same as they *anciently* were, unless it does plainly appear that the *People* who were then in *Being*, and by vertue of which this Right was obtained, were directly of another Mind. Thus did King *Euphaes* permit the *Messenians* to examine which of the *Royal Family* of the *Epyridae* had the best Title to the Throne; and the Dispute between *Xerxes* and *Artabanus* was debated before, and determined by the People.

XXVIII. To proceed to other Matters; that he who was born before his *Father's* Accession to the Throne, ought in a *Kingdom* that is not to be divided, in any kind of *Succession* whatever, to be preferred to him who was not born till his *Father* came to the Crown, is a substantial and certain Truth. For that he would have his Share in a *divisible* Kingdom there can be doubt of it, as well as in other *Goods* and *Effects*, concerning which it signifies nothing when they were got. He then, who in a *Divisible* Government would have his

Share,

XXVIII.
The Son
born before
his Father's
coming to
the Crown
to be pre-
ferred before
one born
after.

(2) It would not be amiss to take the Advice of the *People* now in *Being*. Either in a *Parliament* or an *Assembly* of the whole *States*, as is done in *England* and *Scotland*, according to *Cambden*, in *Ann.* 557 and 72. or by Persons purposely delegated, as in *Arragon*, according to *Mariana*, l. 20.

Share, must surely in that which is Indivisible be preferred by the *Prerogative* of his *Birth*; and for this Reason it is, that a *Copy-hold* Estate goes to that Son who was born before his Father was seized of it. So too, in a *Lineal* Succession, as soon as ever the *Crown* is obtained, the Children who were born *before* immediately entertain hopes of one Day or other *succeeding* to it; for, suppose there were none born *after*, no body will say that those who were born before should be *excluded*. But in this kind of Succession, an hope once entertained creates a *Right*; neither does it cease by any after Fact, unless in a Succession in the *Female* Line, where it may be for a time *suspended* by the Privilege of the other *Sex*. This we are talking of was a Maxim that obtained in *Persia*, between *Cyrus* (a) and *Artica*; in *Judea*, between *Antipater* the Son of *Herod* the Great, and his Brothers; in *Hungary* when *Geissa* begun his Reign, and in *Germany* (tho' not without War) between *Otho* I. and *Henry*.

XXIX.

Unless it appears that the Crown was conferred on some other Condition.

XXIX. But that, as we read, it was otherwise in *Sparta*, is owing to the peculiar Law of that People, which gave the Preference to the Children that were born when their *Father* was on the *Throne*, because of their more exact and nicer *Education*. The same also may happen from some peculiar Law made upon the first Investiture. If,

for

(a) And Artica.] Who was afterwards called *Artaxerxes* Mnemon. See *Plutarch's* Life of *Artaxerxes*.

(b) Between *Otho* the First and *Henry*.] See about this matter *Siebert* and the Observations upon the 3d B. of *Withikind* *Bajazet* and *Gemas* disputed the Turkish Monarchy. *Bajazet* was the Elder, but *Gemas* was born when his Father was actually upon the Throne, *Mariana*, l. 24. *Constantinus* *Ducas* left the Empire to his Sons, two of whom were born when he was a Private Gentleman, the third was πορφυρογεννητός, born a Prince. *Zonaras*, See *Corset*, tract. de prole regali, 3 part. quest. 26.

for Instance, a *Crown* be ganted in *Fee* to a *Vassal*, and to the Heirs of his Body that shall hereafter be born. Upon the Strength of this Argument it was, that *Lewis* did chiefly rely in the Dispute between him and his Brother *Galeatius* about the Dutchy of *Milain*. For (c) as to *Persia*, that *Xerxes* obtain'd the *Crown* to the Prejudice of *Artabazanes*, was, as *Herodotus* observes, owing more to the Power of *Atossa* his Mother, than to his own real Right. For in the same *Persia*, when a like Dispute arose between *Artaxerxes*, *Mnemon* and *Cyrus*, the Sons of *Darius* and *Parisatis*, *Artaxerxes*, as the Elder, tho' born when his Father was in private Circumstances, was yet declared King.

XXX. It has been no less a Dispute, both by Wars and single Combats, (d) whether the Son of the Elder Brother should be preferred before a younger Brother; but this in a Lineal Succession admits of no Difficulty; for there the Dead are reputed as living, in that they are able to transfer a Right to their Children; and therefore in such a Succession, the Son of the Deceased shall certainly be preferred without any Objection to his Age; nay, where the Succession is Cognat-
tical,

XXX.
Whether the
Grand-child
by the Elder
Son is to be
preferred
before a
younger
Son; this
explained
by a Distin-
ction.

(c) As to *Persia*, that *Xerxes*.] And *Artaxerxes* was also made *Xerxes*'s Companion in the Throne, but not *Darius* and *Hystaspes*, who were Elder indeed, but born before their Father got the Crown. And 'tis probable that the Kingdom of *Persia* depended on the People's Choice, tho' confin'd to the Royal Family. For *Ammianus*, l. 23. has related this of the *Asfacide*, who were *Parthians*, but reigned over the *Persians*; and *Zonaras* in *Justin* has said as much of the *Persians* who succeeded these *Parthians*.

(d) Whether the Son of the Elder Brother should be preferred before a Younger Brother.] See *Chopin. de dominio* l. 2. *Thom. Grammat. dec. Neapol. 1. Feb. le Crier de Primogenitura*, which Treatise is infetted in the *Oceano Juris*. *Mariana* l. 20. and 26. *Cromer. fo. 3.*

father, or in the Female Line, the *Eldest Son's Daughter*: because neither *Age* nor *Sex* can be a Plea for going out of the Line. But in *Hereditary Kingdoms* that are *Divisible*, each shall have a *Share*, unless in those Countries where the Right of *Representation* is not observ'd, (e) as formerly among most People in *Germany*; for it is but of late Days, that *Grand-Children* have been admitted to *Succession* as well as *Sons*. However, in any Case of *Doubt* 'tis better to let this *Vice-Succession* take place, as being the more agreeable to *Nature*, as we said before.

2. And where by the *Civil Laws* of a Country, the Custom of the *Son's* coming into his *Deceased* Father's room is once openly introduced and allowed of, there it shall be in force, tho' there be a particular mention made in any Law of the *next of Kin*. The Reasons produced from the *Roman Laws* for this are a little weak, as will appear to any one that looks well into them. But this is one of the best of them, That in a favourable Subject the *Sense* of Words must be extended to their utmost Propriety, they must be taken not only in their *Vulgar Meaning*, but in their *Figurative* one too; so that under the Name of *Sons*, may be comprehended *Adopted* ones; and under that of *Death* may be included a *Civil Death*, (*those that are Dead in Law*) for the Laws generally speak thus. Wherefore he may thus be justly called the *next of Kin* whom the Law puts into the *Degree* of the *next of Kin*. But in *Hereditary Kingdoms* that are *Indivisible*, even where this *Representative*

Succession is not allowed, the Son's Choice, tho' confined to the Royal Family, has related this of the *Palatinate*, who were *Barons* but not *Princes*, and *Barons* in *Germany* are not *Princes* but *Barons* only.

(e) As formerly amongst most People in *Germany*.] See what we have remarked above at §. 10. Upon this Account it was that *Rapier* the Younger was prefer'd in the *Palatinate* to his Nephew *Rapier*, tho' the Son of the *Eldest* Brother. See in *Reinhold* l. 1. c. 11.

Succession is not excluded, neither is the Grandson always, nor always the second Son preferred, but the Affair stands as amongst Equals; because by an effect of Right, as to the Degrees of Relations that are equal; he would have the best Title who is eldest. For as I said before, in Hereditary Kingdoms Succession does not go by the Prerogative of Age. Among the Corinthians, ἀπὸ τοῦ πατρὸς αἵματος, the Eldest of the Deceased King's Children succeeded in the Throne, as George the Monk has proved out of the sixth Book of Diodorus Siculus. So among the Vandals, it being order'd that he who was next in Blood, and the Eldest should be Heir, (f) the second Son was on the account of his being Older, preferred to the Eldest's Son. So in Sicily, Robert was preferr'd before his elder Brother Martel's Son, not properly for the reason supposed by Bartolus, because Sicily was held in Fee, but because the Crown was Hereditary.

3. There is an old Instance of such a Succession in the Kingdom of France in the Person of Guntran; but that happened rather from the Choice of the People, which at that time was not entirely left off. But since that Kingdom ceased to be Elective, and a Succession in the Male Line has been established, the matter is past dispute, as formerly among the Lacedemonians, when the Crown descending on the Heraclide, they made the Succession like this, Agnatic. And therefore Arcus the Son of the Elder Brother Cleonymus, was preferred before his Uncle Cleonymus. And so in the Lineal Cognatic Succession the Grandson shall be preferred.

As

(f) The second Son was, on the Account of his being Older, preferr'd to the Eldest's Son. Thus Henry Genzon's Son was preferred to Gundemund. See what's above in the Text and Notes of § 24. concerning such a Succession.

As in *England*, (g) *John*, *King Edward's* Grand-child by his eldest Son, was preferred before *Heman* and *Thomas*, the other Sons of that *Edward*. And this is also settled by *Law* in the Kingdom of *Castille*.

XXXI.

So likewise whether the King's surviving younger Brother is to be preferred before his elder Brother's Son.

XXXI. By the same Distinction we may answer another Question between the last King's surviving Brother, and the elder Brother's Son; only we must observe, that in many places, where among Children the *Living* are in the *Right* Line allowed to succeed the *Dead*, they are not allow'd it in the *Collateral* one. But where the *Right* does not plainly and directly appear, (h) we ought to incline rather to that side which substitutes the *Child* in his *Father's* room; because natural *Equity* leads us to this, and particularly in *Estates* that have been a long time in the *Family*. Neither is it any *Objection*, that *Justinian* calls this *Right* of Brother's Children *πρεβόμιον*, a *Privilege*: For this he does, not in respect to natural *Equity*, but to an ancient *Roman* *Right*. Let us now run over the other Questions proposed by *Emanuel Costa*.

XXXII.

Whether the King's Brother's Son is to be preferred before the King's Uncle.

XXXII. He says, that the Son, or even the Daughter, of the Deceased Brother, is to be preferred before the King's Uncle; which is true; not only in a *Lineal* Succession, but even in an *Hereditary*

(g) *John*, *King Edward's* Grand child.] See *Serranus's* Life of *Charles the Wise*; and *Marian* l. 18. who tells us there was no manner of Opposition made by *Edward's* Sons. The same *Marianus*, when he had in his 14th B. given an Account of the Dispute between *Alfonso's* Son and his Grandson, says that it was by an Assembly of the *States* declar'd in favour of *Sanctius* the Son, whether justly or unjustly, is uncertain.

(h) We ought to incline rather to that side which substitutes the Child in his Father's room.] See *Serranus* about *John* and *Arvus* in his *Philip Augustus*. And he says in the Lives of *Philip Valerius* and *Charles VIII.* that it was determined in Favour of the *Lineal* Succession.

tary one in such Kingdoms, where a Child is permitted to succeed in a dead Father's room; but not in Kingdoms which in express Words have respect to the Order of Birth; for in those the Person who has the Advantage of Sex and Age is to be preferred.

XXXIII. He adds, that a Grandson by the Son is to be preferred before a Daughter: it is true, upon the Account of his Sex; but with this Exception, unless it be in a Country too, which regards among Children only the Degree.

XXXIV. He also adds, that the Younger Grandchild by a Son, is to be preferred before the Elder by a Daughter, (i) which is true in the Lineal Agnatic Succession, but not in the Hereditary, unless authorized by some special Law. Neither is the Reason alledged for this sufficient, because the Fathers of the one would have excluded the Mothers of the other; for this Exclusion would have been on the Account of a Prerogative merely Personal, which passes no farther.

XXXV. As for what he subjoins as appearing to him the more likely Opinion, that the Grand-Daughter by the Elder Son sets aside a Younger Son, is not allowable in Hereditary Kingdoms, tho' the Representative Succession be admitted there; for this only puts her into a Capacity of succeeding; but among those who are capable the Prerogative of the Sex must carry it.

XXXIII.
Whether the
Grandson by
the Son is to
be preferred
before a
Daughter.

XXXIV.
Whether the
younger
Grandson
by the Son
is to be pre-
ferred be-
fore the El-
der by the
Daughter.

XXXV.
Whether the
Grand-
daughter by
the Elder
Son is to be
preferred be-
fore the
Younger
Son.

VOL. II.

O

XXXVI. As

(i) Which is true in the Lineal Agnatic Succession.] This Mariana, lib. 26. professes in Portugal. However, he says, that for all this B-manuel was, by the Inclinations of the People preferred to the Emperor Maximilian. And in his 12th B. he says, that the Reason why Ferdinand the Son of Belegaria, the Deceased King Henry's Younger Sister, was preferred to the Crown of Castile before Blanch that King's Elder Sister, was their Hatred to the House of France into which Blanch had married.

XXXVI.
Whether the
Sister's Son
is to be pre-
ferred before
the Brother's
Daughter.

XXXVI. And therefore (k) in the Kingdom of Arragon the Sister's Son was preferr'd before the Brother's Daughter.

XXXVII.
Whether the
Elder Bro-
ther's
Daughter
is to be pre-
ferred before
the Younger
Brother.

XXXVII. And after the same manner in Hereditary Kingdoms, the Daughter of the eldest Son must yield to the King's Younger Brother.

C H A P. VIII.

Of such Properties as are commonly called Acquisitions by the Right of Nations.

I. Many
things are
said to be by
the Right
of Nations,
which pro-
perly speak-
ing are not
so.

I. I. **T**HE Order of our Subject has now brought us to treat of that *Acquisition* or *Property*, which is, by the *Law of Nations*, distinct from the *Law of Nature*; which we have therefore above called the *Voluntary Law of Nations*. Such is that *Acquisition* which is obtained by the *Right of War*; but of this we shall speak more seasonably hereafter, where the *Effects of War* are explained. The *Roman Lawyers* when they treat of the acquiring the *Property* of things, reckon up many methods, which, they say, are according to the *Right of Nations*. But a diligent Examiner will find that all of 'em, except that gained by the *Right of War*, do no ways belong to that *Right of Nations*,

(k) *In the Kingdom of Arragon.*] 'Twas formerly the Opinion there, says *Mariana*, that the King's Brother, and not his Daughter, ought to succeed. But afterwards they were so well pleased with a *Lineal Succession*, that the *Sister's Son* was preferred to those, who, in a more distant *Degree* were descended from the Brother. l. 15. 13. 19. 21. 20. 28. And in his 24th B. speaking of *Alfonso*, He enacted, that in the *Succession* to the *Arragonian Kingdoms*, his Grandsons should have the Crown before *Ferdinand's Sons*; and that, upon failure of Male Issue, even his Daughter's Sons should be preferred to the other's Daughters; and then makes this Reflection, Thus are the Titles to Crowns frequently alter'd as Princes themselves please. See *Mariana*, l. 27, 3.

Nations, which we are now treating of : But are either to be referred to the *Law of Nature*, not to that Primitive *Original* one, but to that which was the immediate *Consequence* of an *Established Property*, and before all *Civil Law*; or, they are such as may be referred (a) to the *Civil Law* it self, not only *that* of the People of *Rome*, but of many other *Nations* round about 'em; which I rather believe, because this *Civil Law*, or *Custom*, came originally from the *Greeks*, whose *Institutions*, as *Dionysius Halicarnassensis* and others observe, all *Italy*, and the *Neighbouring Nations* followed.

2. But this is not the *Law of Nations* properly so called, because it does not belong or contribute to the *Mutual Society* of *Nations* amongst themselves; but rather regards the *Peace* and *Tranquility* of each particular *People*; and therefore might be *alter'd* by any *one People*, without consulting the *others*; and it may also happen, that in some other *Places*, and at some other *Times*, a very different *common Custom*, and so another *Law of Nations*, improperly so called, might be introduced; which we found was really done, when the *German Nations* invaded almost all *Europe*. For as formerly the *Grecian Laws*, so then the *German* were generally received, and are as yet in force. Now the *first* way of *acquiring* a *Thing* by the

O 2

Right

(a) *To the Civil Law it self, not only that of the People of Rome, but of many other Nations round about 'em.*] Such a *Consent of Nations* as this, where no Cause can be assign'd for it, even in other *Customs*, which have no Relation at all to *Right*, is taken notice of by *Pliny*, as that a *Child* shall not be *burnt* (the old way of disposing of *Dead Bodies*) till it has bred a *Tooth*, 7. 16. that the *Ionian Letters* or *Characters* shall be every where made use of 7. 57. that *Shaving* should be universal. 7. 59. that *Hours* are observ'd, 7. 60. that *Kneeling* should be thought a *Religious Posture* 10. 45. that a *Respect* or *Adoration* be paid to *Lightning* by *smacking* the *Lips*.

Right of Nations, as the *Romans* call it, is the first *Seizure* or *Possession* of things that have no *Owner*: Which way is certainly *Natural*, in the Sense I mentioned, now *Property* is *Establish'd*, and as long as no *Law* had determin'd any thing to the contrary; for the *Civil Law* too can entitle us to a *Property*.

II. *Fish in Ponds, and Beasts in Parks, are by the Law of Nature one's own peculiar Property, notwithstanding whatever the Roman Laws have declared to the contrary.*

II. And to this Head we may in the *first* place refer the catching of *Beasts*, *Birds* and *Fish*. But how long all these may be said to be *no Bodies*, admits of some Dispute. *Nerva*, the *Son*, was of Opinion that *Fish* in a *Pond* were *our own*, but not those in a great *Lake*; and that *Game* inclosed in a *Park*, but not those that had the Liberty to *Range* in *Forrests*, tho' those *Forrests* were *fenced in*. Whereas *Fish* are no less inclosed in a private *Lake* than in a *Pond*, and *Forrests* which are *fenced in* do secure *Beasts* as well as any of the *Parks* which the *Greeks* call *ἰσχυροτροφεία*, *Places to breed up Beasts in*. Nor is there any other difference between 'em, than that the one is the *closer*, the other the *larger* Confinement. And therefore now-a-days the contrary Opinion does more justly obtain, that as we have the *Possession* of, so have we too a *Property* in, not only *Beasts* in private *Forrests*, but *Fish* inclos'd in *Lakes*.

III. *Wild Beasts that get away cease not to be the first Owners, if they can know 'em again.*

III. The *Roman Lawyers* say, that we lose our *Property* in *wild Beasts* as soon as ever they recover their natural *Liberty*; but in all other things the *Property* acquired by *Possession* does not cease with the loss of *Possession*; nay, it gives us a *Right* even to *claim* and *recover* our *Possession*. And whether they be *taken away* from us by *another*, or get away of themselves, as a *Fugitive Slave*, it is all one. Wherefore it is more agreeable to *Truth*, that our *Property* is not lost *meerly* because the *wild Beasts* have made their *Escape*, but from a pro-

probable Conjecture, (b) that by reason of the difficulty of pursuing and recovering them, we may have given them over for lost, especially if we cannot tell which are ours from others. But this Conjecture may be destroy'd by other Conjectures, as by putting (c) *γνώσματα*, Marks, or (d) *Crepundia*, Bells upon 'em, as has been often done to Stags and Hawks, whereby they have been known and restored to their Owners. Now to gain a compleat Property in such things, (e) it is requisite that we should have their Bodies actually in our Possession; and therefore it is not enough to have wounded the Beast, as it was rightly alledged against Trebatius. Hence comes the Proverb, *Aliis leporem incitasti*, (f) You have started the Hare, but others run away with it. And Ovid tells us in his fifth Book of Metamorphoses, that it is one thing to know where a thing is, and another to catch it.

O 3

IV. Now

(b) That by reason of the Difficulty of pursuing and recovering them, we may have given them over for lost.] We observ'd at Ch. 4. §. 5. that this was call'd by the Hebrews *שׁוֹנִי*.

(c) *Γνώσματα*.] Donatus ad Eunuch 4. 6. These Marks or Tokens are what the Greeks call *γνώσματα* or *στίγματα*.

(d) *Crepundia*.] Apuleius in his Apologet. uses this Word in that Sense.

(e) It is requisite that we should have their Bodies in our Possession.] Harmenopulus l. 11. tit. 1. *μη ἐρέω σε ὅδε* &c For he who wounds it, can no otherwise become Master of the Beast, but by actually catching it.

(f) You have started the Hare, but others run away with it.] 'Tis in Petronius. So Ovid,

Et lepus hic aliis exagitatus erit.

I've put Pufs up, but others run her down.

By a Law of the Lombards, whoever kills or finds a Beast that some body else has wounded, takes the Shoulder and seven Ribs. He who wounded has it a Title to the rest, but then this Title lasts no longer than 24 Hours.

IV. Whether Possession may be gained by Instruments, and how.

IV. Now this *Possession* may be gain'd not only with our *Hands*, but with *Instruments*, such as *Traps, Nets, Gins, &c.* provided that these *two Circumstances* go along with it. First, That the *Instruments* of *Game* be placed where we have a *Right* to set 'em; and *Secondly*, that the *Beast* be so secured as that it cannot get away. And thus must we decide the Case of the *Boar in the Tail*.

V. It is not against the Law of Nations that all wild Beasts should belong to the Crown.

V. These things are then only to take place, where no *Civil Law* intervenes; wherefore our *Modern Lawyers* are very much mistaken, who think those *Rights* to be so *natural*, as that they cannot be changed; for they are not *absolutely*, and *in themselves* natural, but only with regard to the state of things at that certain Time, that is, if it be not otherwise provided. Thus the People of *Germany* consulting about making some *Allowances* to their *Princes* and *Kings* to support their *Dignities*, (g) very wisely thought it proper to begin with such things as might be given without *Damage* to any one; such are those which no Person could lay particular *claim* to; which I find that the *Aegyptians* also practised: For there the King's *Commissioner*, whom they called ἰδιον λόγον, *his own Reason*, seized on all such things to the Use of the Crown. The *Law* indeed could of it self transfer a *Property* in any thing before Possession, since the *Law* alone is sufficient to create a *Right*.

VI. How the Possession of things that have no Owner may be gained.

VI. After the same manner as *wild Beasts* become our own, so do also (h) other ἀδικοῦσα, *things*

(g) Very wisely thought it proper to begin with such things as might be given without *Damage* to any one.] But of the ill Use of this Right, See *Sarisher. Policratic.*

(h) Other ἀδικοῦσα.] In *Portugal* the *Whales* that are cast up and left by the Sea are the King's. *Georg. de Cabedo dec. Lusit. part. 2. dec. 48.*

things that have no Owner. For Nature gives all these to him who finds, and lays hold on 'em first. Thus was the Desert Island of *Acanthos* adjudged to the *Chalcidians*, who first entred upon it, not to the *Andrians* who had first shot an Arrow into it. For the Beginning of Possession is joining Body to Body, and this in Moveables is done usually by the Hands; but in what relates to taking Possession of Lands, by our Feet. To know where a thing is, is not finding it, as we have it in *Ovid Metam.*

VII. Among things that have no Owner, are reckoned Treasures, that is, Mony, whose Owner is not known; for what appears not, is, as if it were not. Wherefore such Treasures naturally belong to the Finder, that is, to him who moves them from the place, and secures them; yet not so, (i) but that Laws and Customs may order it otherwise. *Plato* would have notice given to the Magistrates, and the Oracle consulted. And *Apollonius* looking upon such a Treasure as a particular Kindness of God, adjudg'd it to the best Man he was acquainted with. The *Hebrews* (k) gave it to the Owner of the Ground wherein it was found, as may be gather'd from *Christ's Parable*, *Matt. xiii. 45.* And that the *Syrians* did the same, I infer from a Story in *Philostratus*, Book 6. Chap. 16. The Laws of the Roman Emperors are very various upon this Subject, as appears partly from their Constitutions, and partly

VII. To whom Mony found does naturally belong; and the variety of Laws about it.

O 4

(i) But that Laws and Customs.] 'Twas a Law in *Byblus*. *quod non posuisti ne tollas*, don't take up what you did not lay down. *Apollonius* proves this in *Philostratus*.

(k) Gave it to the Owner of the Ground.] This Right seems to have been in force at *Rome* in *Plautus's* Time. For *Callicles* says, Had he bought it, wou'dn't all that Mony have been his? And then afterwards, The Purchaser of the House might, by the Law of the Land, demand of me all the Treasure that was found there.

partly (l) from the Histories (m) of Lampridius, Zonaras and Cedrenus. The Germans awarded those Treasures, and indeed all other ἀνταλλά to their Prince, which now is grown so common, that it may pass for a Law of Nations. For it is now observed (n) in Germany, France, England, Spain and Denmark. We have already sufficiently shewn why this cannot be charged with Injustice.

VIII. That what is delivered us by the Roman Laws concerning Islands and Inundations is neither natural nor from the Right of Nations. Bart. Tyber. Bapt. Aym. Conan. Mart.

VIII. Let us now proceed to Improvements made by Rivers, of which the old Lawyers have left us several stated Cases; (o) and the Modern furnish us with whole Commentaries. But what they have writ upon this Subject, is for the most part grounded not on the Law of Nature, but on the Laws of some Nations, tho' they often put them off under that Name. For most of their Decisions are built upon this Foundation, that the Banks of the River belong to him who possesses the adjoining Lands; and that the Channel, when it is forsaken by its Waters, is also his, and consequently that the Islands cast up in the River are so too. They likewise distinguish one Inundation from another; a small one

(l) From the Histories.] See Tacitus about the Treasures in Africa, which Nero had in his Mind and Expectations already swallow'd up, *Annal.* 16. See Philostratus in the Life of *Asticus*, which Pausanias Zonaras has transcrib'd in his *Nervu*.

(m) Of Lampridius.] In his *Adrian* and *Severus*.

(n) In Germany.] See *Spec. Saxon.* c. 35. Frederick's Constitutions in *Sicily*, B. 1. tit. 58, and 103. The Goths had the same Custom. King Theuderick in *Cassiodore* 4, 34. There's no great Covetousness in taking what no body is sorry to lose. And in the 6, 8. When you meet with any Hoards of Money, which by a long course of time have lost their proper Owner, let 'em be put into our Treasury; for since we suffer all Persons to enjoy their own, they need not be unwilling to let us take what they have no Title to: He may very well surely part with what he has found, who does not lose what is his own.

(o) And the modern furnish us with whole Commentaries] Joh. Bor. Anton. Marf. Joh. Gryphind. besides those in the Margin of the Text.

one does not take away the *Property*, but a great one does; yet so, that if the Flood retires all of a sudden, the Land so overflowed, shall, by the drawing off of the Waters, as if by *Postliminy*, return to its first *Proprietor*, but if it decreases by little and little only, it is another thing; it goes to them who own the neighbouring Estate. Now I do not deny, but all this might be introduced by some particular Laws, and (p) with the Advantageous Prospect of making People more careful in securing their Banks; but that 'tis so by a natural Right, (as they seem to imagine) I can by no means allow.

IX. 1. For if we regard what generally happens, the Lands (q) were originally possess'd by the Body of the People, who not only made themselves Masters of the Jurisdiction over 'em, but also of the Property in 'em, before they were parcel'd out to private and particular Persons. What we, says Seneca, call the Frontiers of the Athenians, or the Campani, are such Boundaries as the neighbouring Inhabitants do afterwards among themselves distinguish by a particular and fix'd Allotment. And so Cicero, There's no Man can say that he has any thing his own by a Right of Nature; but either by an Ancient immemorial Seizure, as those, who first planted uninhabited Countries; or by Conquest, as those who have got things by the Right of the Sword; or else by some Law, Compact, Agreement, or Lot. 'Tis by some of these means, that the People inhabiting Arpinum and Tusculum, came to have those Lands which are now call'd theirs; and the same may be said as to private Mens

IX. That an Island in a River and a dried up Channel are naturally his, to whom the River, or that part of the River belongs, that is, they are the Public's.

(p) With the Advantageous Prospect of making People more careful in securing their Banks.] See a Passage of Cassius in Urbicus and Boethius.

(q) Were originally possess'd by the Body of the People.] See what's above in the Text and Notes of Ch. 3. §. 19.

Mens Estates. And *Dion Pruseensis* in his *Rhodiaca*, *πολλὰ ἔστι εὐραία* &c. There are many things to be found, that the Publick does in general claim for its own, which tho' they are are parcell'd out into particular Shares, yet does the Right to the whole continue as before. Thus too *Tacitus* of the Germans, The Lands (*per Vicos occupantur*, 'tis a mistake to read it *Vices*) are canton'd out and possess'd by all, in proportion to the number of Hands to improve 'em; and then they are divided amongst 'em, with regard to every Man's Quality and Circumstances. And therefore whatever was thus at first possess'd by the Publick, and not afterwards parted with, must be suppos'd to be still the Property of the Publick; for as in a River that belongs to a private Person, any *Isletts* that shall be cast up, or any *Channel* that shall be left dry, becomes that private Person's: So in a publick River, both of these are the Publick's, or his to whom the Publick has granted 'em.

2. What we have here been saying of the *Channel*, (r) holds good also as to the *Bank*, which is nothing but the utmost part of the *Channel*, that is, of the *Passage* where the Stream of the River naturally runs. And thus it is every where taken. In *Holland*, and the neighbouring Countries, many such Disputes did formerly arise, by reason of the lowness of their Lands, the greatness of the Rivers, and the nearness of the Sea, receiving Mud and Dirt in one Place, and carrying it back to another by the Ebbs and Flows of successive Tides: Those that were really *Islands*, were always reckon'd part of the publick *Demain* or *Patrimony*; as are also the entire *Channels* of the *Rhine* and

(r) Holds good also as to the Bank.] So 'tis in France. *Sanction des Eaux & Forêts*, B. 2. c. 1.

and the *Maese* left by the Waters, as has been often adjudged, and grounded upon very good Reason.

3. For the *Roman* Lawyers themselves do allow, that an *Island* (*s*) which floats in a River, held up perhaps by some *Shrubs* growing there, belongs to the State, because whoever has a Title to the *River*, must needs have as good a Title to the *Island* that is in it. And there's the same Reason for a *River*, as for its *Channel*, not only upon that Account which the *Roman* Lawyers alledge, because the *Channel* is covered by the *River*; but for the Reason already mentioned, because it was originally possess'd with the *Rivers* by the *People*, and had never been the *Property* of any private Person. Nor do we allow what they urge to be *natural*, that if the Lands were bounded, the *Island* would belong to the first Owner: This indeed would be so, (*t*) if neither the *River* nor the *Channel* with it had ever been in the Possession of the *Publick*, as an *Island* raised in the *Sea* belongs to him who shall first seize on it.

X. 1. Nei-

(*s*) Which floats in a River.] You have a Description of some floating Islands in *Seneca*, *Natural* 3. 25. *Pliny* the Elder, l. 2. c. 97. *Macrob.* 1. *Saturnal.* 1. 7. There's an elegant Description of such Islands in the Lake *Vadimon* in the younger *Pliny*, l. 8. c. 20. and of some *Flanders* ones in *Chifflet*, a Book very well worth your reading.

(*t*) Neither the River nor the Channel had ever been in the Possession of the Publick.] *Siculus Flaccus*, in his *B. de condition. Agror.* In some Countries you have only so much Right to a River as is particularly assign'd you: In some there's a distinct and separate part allotted, and you're excluded from any thing more, your Title reaching to that River alone. See what *Salmasius ad Solinum* has said very handsomely de *Subsecrvis*, as indeed all that he does say is very handsome. Upon this whole Subject of Rivers and River Improvements, you may consult at your leisure, *Rosenthalius de Jure feudorum* c. 5. concl. 23. *Sixtinus de regalibus*, l. 2. c. 3. *Capolla de servit. rustic. præd.* c. 31.

X. That a Flood does not, according to Nature, take away a Property in Land.

X. 1. Neither is that more to be allowed, which they talk of a greater *Flood*, if we respect only *natural Reason*. For suppose we grant, that the Surface of the Land may be cover'd and softned with *Sand*, yet the lower parts of it remain *firm* and *solid*; and tho' some of the *Quality* be changed, yet the *Substance* is not changed at all, no more than that part of a *Field* is, that is devoured by a *Lake*, the *Property* whereof, as the *Romans* judiciously acknowledge, is not chang'd. Nor is that by any means *Natural* which they say, that (u) *Rivers* do in this Case, like those *Officers*, who upon *Non-payment* of *Taxes* seize upon one *Man's Land* and give it to another, for they take from the *publick* to give to *private* Persons, and take from *private* Persons to give to the *Publick*. Much better did the *Egyptians* understand and manage this matter, as *Strabo* reports of 'em: ἐξένειν δὲ τὴν ἀρχαίαν &c. They are oblig'd to be particularly exact and nice in the Division of their Lands, because of the frequent Confusion of Boundaries, which the Nile by its overflowings occasions, taking from one part and adding to another, changing the very Form and Look of Places, and entirely concealing all those Marks, that should distinguish one *Man's Property* from Another's. And therefore there's a Necessity for their often making new Surveys.

2. Hereunto agrees what the *Roman Authors* have deliver'd us, that what is ours, ceases not to be ours, but by our own Fact; add, or by virtue of some Law. Now under things done are comprehend'd, as we told you above, things not done, as far as

we

(u) Rivers do in this case, like those Officers, &c.] *Cassiodorus* speaking of one whose Business it was to survey and regulate the Dimensions of Lands; like some vast River he takes a Piece from one, and gives new Property to another.

we can guess by 'em at another's *Will* and *Inclinations*. Wherefore we grant, where the *Flood* is very great, and no visible signs of the *Owner's* Intention to *retain* his Property, it may well be presumed, that he gives his *Land* over for *lost*. Which *Presumption*, as it's *naturally* uncertain and undeterminable, by reason of the *variety* of *Circumstances*, and therefore to be referred to the Judgment of some *honest* Man, its usual to have it decided by the *Civil Laws*. As in *Holland* that *Land* is given for *lost*, which has been under *Water* for *ten* Years, if there appear no Signs that the Possession is still continued, in which case 'tis our Custom, and that far from an unreasonable one, tho' the *Romans* do not observe it, to suppose the *Owner* retains his *Possession* by only *Fishing* there, if he can no otherwise signify the keeping of his *Title*. But *Princes* used to fix a certain time, within which the ancient *Owners* of the *Lands* were to *drein* their *Grounds*, which if they did not, then they who have the *Mortgage* of them are to be warned to it, and upon their neglect then the *Gentlemen* of the *Country*, who have a proper *Pow'r* and *Commission*, are to do it; and if they also delay to perform it, then all the *Right* and *Title* to 'em devolves on the *Prince*, who either *dreins* the *Lands* himself, and so *Unites* 'em to his own *Revenues*, or gives 'em *others* to *drein*, and only reserves a *Share* of 'em.

XI. 1. Whatever *Improvements* the *Floods* make, that is, whatever little *Parcels* and *Bits* of *Land* may be added, which, because it is not known whence they came, can be claim'd by no Body, (for otherwise the *Property* could not *naturally* be chang'd) must certainly belong to the *publick*, provided the *publick* has the *Property* of the *River*, which is always to be suppos'd in a doubtful Case; if not, 'tis the present *private* Owner's.

XI. Improvements made by Floods, if in Dispute, belong to the Publick.

XII. 1. But

XII. But
they seem to
be granted
to those
whose Lands
have no o-
ther bounds
but the Ri-
ver.

XII. 1. But the *Publick* have Power to grant 'em, as to others, so also to those who own the Lands next adjoining; and they are supposed to do so, if those Lands have no other Bounds on that side, but the natural ones, that is, the River it self. And here that *Distinction* which the *Romans* make between Lands bounded, and Lands measured, may be proper, but yet both of 'em have in this case an equal Right. For what we have said before concerning Governments and Jurisdictions, when we treated of the possessing of them, the same is of force in private Lands, but with this difference, that the Bounds of Kingdoms (if in dispute) are presumed to be (*Arcifinious*) bounded by Hills, Woods, or Waters, because most agreeable to their Nature. But private Lands are rather supposed to be bounded either by Land-marks, or by Measure, as most suitable to their Nature.

2. But yet we do not deny, but that the People may assign their Land; with the same Right as they themselves enjoy it, that is, as far as to the very River; which if so, then is any Improvement that shall be made in this manner, theirs also, as it was adjudged in *Holland*, not many Ages since, of Lands bordering upon the Rivers *Isal* and *Maese*; because both by the Deeds of Purchase, and by the Books of Rate, they were always mentioned, as reaching to the River. And tho' in the Sale of these Lands, somewhat of the Measure be express'd, yet it shall retain its own Nature, and have Right to whatsoever the Inundations shall add to it; which is also mentioned in the *Roman* Laws, and generally practised.

XIII. The
same may be
said of the
Shore that
the River
leaves, or of
any part of
the Channel
that's dried
up.

XIII. What we have said of an Improvement by Floods, does also hold good of that part of the Shore or Channel which the River forsakes; for where there is no present Owner, the next Possessor has the best Title. In Rivers that are theirs, it be-
longe

longs then to the *People*, or to them to whom they *themselves*, or such as are *impower'd* by them, have assigned the Lands next *adjoining*, particularly specifying, that they are *bounded* by the *River*.

XIV. But since, as we said, there is one sort of *Right* relating to an *Island*, and another to the *Improvement* that an *Inundation* makes, Disputes often arise, by which of the *Names* to call that little *rising* Ground, which appears *near* the *Lands* adjacent, but yet is *divided* from them by some *Waters* that cover the space between. This is what we often see in our *Countries*, where the Ground is *uneven*. Nor do our *Customs* in this Affair always agree, for in *Gelderland*, where-ever a *loaden* Cart can pass, belongs to the *Owner* of the *Estate* adjoining: So it is also in the *District* of *Puttene*, (*) where-ever a Man on Foot can with his *Sword's* Point touch the *Ground*. But it is most natural, that if the *Passage* over be generally by *Boat*, it should be look'd upon to be entirely *separate*, and therefore belonging to the *Publick*.

XIV. What is to be reckon'd a Flood-Addition only, and what an Island.

XVI. 1. Another Question as frequently arises between a *Prince* invested with *Sovereign* Power, and his *Vassals* or *Deputies*, who have a Power too, but one *inferior* to, and *dependent* on his. But it is a very plain case, that the bare *Grant* of such a Power does not *entitle* the Person so *impower'd* to all the *Advantages* that arise from the *Rivers*.

XV. When the Improvements made by Floods belong to those who act immediately under the Prince.

We

(*) Where-ever a Man on Foot can with his *Sword's* Point touch the *Ground*.] According to the old *German* Custom. *Paul Warnafred* speaking of *Autharis* King of the *Lombards* *Hither* (to a certain *Pillar* in the *Sea*) *Autharis* came, and sitting down there touch'd it with the Point of his *Spear*, saying, Thus far shall the *Frontiers* of *Lombardy* reach. You have such another Story in *Saxo*. B. 10. and others, of the *Lance*, which the Emperor *Orto* throwing into the *Sea*, said, that by that he mark'd out the *Bounds* of his *Empire* in the *Baltick*.

We must observe however, that many thus entrusted with these limited Governments, do, together with them, receive the *Profits* of all the *Lands* in general, except those possessed by *private Men*; supposing that those *Lands* were anciently either the *People's* or the *Prince's*, or at least drained by the *Prince*; and if so, then without doubt, to whatever the *Prince* or the *People* did enjoy, those deputed by 'em have as good a *Right*. Thus we see in *Zealand*, that those who have only a very small Jurisdiction, pay a *Tax* for the whole *Bulk* of their *Lands*, which they afterwards Levy upon each particular Person, in proportion to the *Value* and *Bigness* of his *Estate*: And these, without any Disturbance, take to themselves all such *Improvements*. There are some, to whom the *River* it self is granted, who may therefore justly claim the *Islands* thereunto belonging, whether such *Islands* are of *Mud*, or made of *Sand* and *Earth*, which the *River* has in its *Channel*, by flowing round it, heap'd together.

2. There are also others, in whose *Grants*, neither the *one* nor the *other* is comprehended, and these have an ill Cause to defend against the *publick Exchequer*, unless the *Custom* of the *Country* favours them; or a long *uninterrupted Possession*, with all *requisite Circumstances*, gives them a *Right*.

3. But if the *Lands*, and not the *Government*, be granted to them, we must see what the *Nature* of the *Land* is, as I said before. For if it be *Ar-cifinious*, then the *Improvements* are granted with the *Land*, not from the *peculiar Right* of the *Prince*, but the *Quality* of the *Land*; for in such a case, the Advantage of what the *Floods* cast up, would be the *Tenant's*.

XVI. The *Roman* Lawyers, in order to prove the Laws us'd by them to be those of *Nature*, often alledge this Saying; That it is most agreeable to *Nature*, that he should have the *Profit* of any thing who has also the *Disadvantage* of it; wherefore, since the *River* does often wash away part of *my* Land, it is but reasonable, that whenever it makes any *Addition*, it should be *mine*. But this *Rule* does not hold, unless where the *Benefit* arises from what is *my own*, but here it arises from the *River* which belongs to *another*. But it is *natural*, that whatever *Loss* there is, the *Owner* should bear it. Besides, what they alledge is not *universal*, as may appear by the *Exception* of *limited* Lands. Not to insist upon what often happens, that a *River* makes some Persons *Rich*, and others *Poor*, according to *Lucan*,

XVI. The Arguments with which the Romans would prove their Rights to be as it were the Rights of Nature, answered.

*Illos Terra fugit Dominos, his Rura colonis
Accedunt donante Pado.*

*Some gain, some lose, just as the inconstant Po
Thinks fit to leave, or to o'erflow their Lands.*

XVII. But as to what they say, that a *publick* Road does no ways hinder the Right to such *Flood-Advantages*, it has nothing of *natural* Reason in it, unless the *Ground* belongs to some private Person who is obliged to provide such a way.

XVII. A Highway naturally hinders any Advantage which a Flood might make.

XVIII. Among those means of *Acquisition*, which are called means that the *Right* of *Nations* allows of, one consists in the *Produce* or young of *Animals*, wherein (a) that which the *Romans*, and

VIII. That it is not natural that the young should follow the Dam only.

VOL. II.

P

some

(a) That which the Romans.] With this agrees, chap. 31. of Charles the Bald in his Edict at Piffes. Of some other People's Laws, relating to this Affair, see above in the Text and Notes of the 7th Chap. of this Book, §. 29.

some other Nations have decreed, that the young one should go long with its *Dam*, is not natural, as I have said already, but only as the *Sire* is generally unknown. But if the *Sire* could by any probable means be discovered, there can be no Reason given, why the young should not belong to him as well as her; for it is certain, that whatever comes into the World, is part of him that begets it. But whether the *Male* or *Female* contributes most to its Production, is not yet agreed upon amongst Naturalists. *Plutarch* speaks thus of it, ἡ φύσις μίγνυσι διὰ τῆς &c. Nature does so mix our two Sexes, that taking a Part from each, and blending 'em together, (b) she returns what is born common to both, in such a manner that neither of them can distinguish or discern that which was theirs, from that which was the other's. And this is what the ancient Laws of the French and Lombards copy'd after.

XIX. That a thing according to Nature, becomes common, as well by its Specification or Form where the matter is another's, as by Confusion or Mixture.

XIX. If any Body had form'd a thing out of another's Materials, the *Sabinians* gave the Property to him whose the Materials were, but *Proculus* to him who form'd or put it into such a Shape, because he gave it an Existence which it had not before. At last a middle Opinion was taken up, that if the matter could be put into its first Form or Shape, it should then be his who own'd it before; if that could not be done, then it should be his who gave it its last Form. But *Connanus* does not like this, and is for having us consider, whether the Work or the Stuff was worth most, that so that which was of the greater Value, might carry it from the other

(b) She returns what is born common to both.] See an excellent Passage to this Purpose in *Galen* 11. de Semine, and what he has there out of *Athenaus*. And *St. Chrysostom* upon the viii of the *Ephesians* μίγνυται τῶν σπέρματων τῶν ἁνδρῶν καὶ τῶν θυναικῶν, The Child is got by a Mixture of both their Seeds.

other of less Importance; an Argument fetch'd from what the *Roman* Lawyers have said concerning an *Accession*.

2. But if we consider the *natural* Truth, as by a *Mixture* of several *Materials*, there arises a *common* Title to the Thing so *mix'd*, in Proportion to what *each* has *contributed*, which also the *Roman* Lawyers approv'd of, because the Right to such a *Mixture* could not otherwise *fairly* be decided; so when a *Thing* is compos'd of a *Matter* and a *Form*, as of its *Parts*, if the *Matter* belongs to one, and the *Form* to another, then must it *naturally* follow, that it belongs to each *Contributor*, in Proportion to the value of each *Part*; for the *Form* or *Shape* is a *Part* of the *Substance*, but not the *whole* Substance; which *Ulpian* saw when he said, that the *Substance* was almost *lost* by the Alteration of its *Form*.

XX. But, though it be not *unjustly* order'd, that he who Undertakes another Man's Work and spoils his *Materials*, either purposely or for want of that Skill he pretended, shall thereby lose his *Labour*, and forfeit all that he would be otherwise entitl'd to, yet since this has its *Penalty*, it cannot be founded on any *Natural* Right. For though it be *Natural*, that ev'ry Offender should be punish'd, yet *Nature* does not determine that *Punishment*, nor does she of her self take away any one's *Property* for his *Offence*.

XXI. And to say that the Thing of a *Lesser* Value, must be carry'd by that which is of *Greater* Worth, upon which *Connanus* builds, though it be *Natural* in respect of *Matter of Fact*, yet it is not so of *Right*. Wherefore he that has but the *Twentieth* Part of an Estate, has as much *Right* in that Part as he, who has the other *Nineteen*. And therefore what the *Roman* Law has in some particular Cases decreed, or in some others may de-

XX. *Nay,* though by Unskillfulness or Design the Matter be spoil'd.

XXI. That it is not Natural, that a Thing of lesser Value should on the Account of the other's greater Worth, go along with it; where also other Mistakes of the Roman Lawyers are taken Notice of.

cree, concerning an *Accession* on the Account of *Superior Value*, is not allowable by the *Law of Nature*, but only by the *Civil Law*, for the better dispatch of Business; yet it is not *Repugnant* to *Nature*, because the *Law* has Power to create a *Right*. But there is scarce any one Question, that relates to *Right*, about which both the *Opinions* and the *Mistakes* of *Lawyers* are so different as in this. For who can allow, that if *Brass* and *Gold* were mix'd together, they might not be separated, as *Ulpian* writes; or if *Metals* were sold together, they must needs be confounded, as *Paulus*; or that there is one Rule for *Writing*, another for a *Picture*, that this should carry away the *Cloth*, but that *that* should go along with the *Paper*.

XX. By Planting, Sowing, or Building, upon another Man's Ground; two Parties are naturally admitted Sharers.

XXII. That what is planted or sown, should go along with their *Soil*, is also a Maxim of the *Civil Law*, for this Reason, because they are *Nourished* by it. And therefore it is a Distinction about a *Tree*, whether it had taken *Root* or not; for the *Nourishment* of a Thing that was growing before, gives a Title to *Part* of it only; because, as there is some *Right* due to the *Owner* of the *Soil*, on the account of that *Nourishment*, so there certainly still remains a Natural Right to the *Owner* of the *Seed*, *Plant* or *Tree*. So that in this Case too, *Nature* admits of *Partnership*; as likewise in a *Building*, of which the *Ground* and the *Surface* are only *Parts*; for if it were *Moveable*, the *Owner* of the *Ground* could have no *Right*, of which Opinion was *Scævola*.

XXIII. He who has another Man's Things in Possession cannot claim the Profits of 'em, but may charge him with all the Expences that he is at about 'em.

XXIII. Nor does *Nature* allow him, who has got another Man's Goods in his Possession, though it were *honestly* and *without Fraud*, to appropriate the *Profits* of 'em to himself, but only impowers him to charge the *Cost* he has been at, and the *Pains* he has bestow'd upon 'em, and to deduct for

for these out of the *Profits* so arising. (c) Yes, and to keep what he has remaining by him, and not part with 'em at all, if *Satisfaction* be not made him some other way.

XXIV. The same, I think, may be said of him, who is *unjustly* possess'd of another Man's Goods, where no *Penal Law* intervenes. *It is kind and like a Gentleman*, (says *Paulus the Lawyer*) to have a *Regard* to the just *Expences*, even of a *Fellow who Robs me*; for he who demands his own, ought not to advantage himself by another's Loss.

XXV. The last way of acquiring a Property by the *Law of Nations*, is a *Formal Delivery*; but we have said above (d) that a *Delivery* is not by the *Law of Nature* requir'd in the transferring of a Property, which the *Civil Laws* themselves do own in some Cases; as when the *Thing* it self is given away, but the *Profits* reserv'd, or when it is made over to him, who has it already in his Possession, or keeps it when he only borrow'd it; when *Money* is thrown among the People upon solemn Occasions. Nay, a Man may transfer his Property even before he is seiz'd of it himself, as an *Estate* in *Reversion*, *Legacies*, *Things* given to *Churches* and pious *Places*, or to *Corporations*, or in Consideration of a *Maintenance*, and Goods that we have agreed shall be shar'd and us'd in *Common*.

P 3

XXVI. This

XXIV. And this he may do though he got 'em unjustly.

XXV. That an actual Delivery is not requir'd by Nature in the Transferring of a Property.

(c) Yes, and to keep what he has remaining by him.] See upon this Subject, *Spec. Sax.* Where are many admirable Things and full of Equity, 11, 46.

(d) That a delivery is not, by the Law of Nature, requir'd in the Transferring of a Property.] No indeed: See the *Wifigothic Law*, c. v. tit. 11. c. 6. The Delivery then seems to be Real, when there's an *Authentic Copy* of the Grant. And amongst the *Ancient Romans*, Goods and Commodities were compleatly alienated, per as & libram, by the Formalty of striking the Scales with a Piece of Money before witness. See *Varro*, l. iv. de ling. latin. *Festus Pompeius* in the Word *Rhodus*; *Ulpian Institut.* tit. xix. *Brethius* ad *Topic.* *Ciceron.*

XXV. The
Design and
Use of what
has been hi-
therto said.

XXVI. This then we have thought fit to observe, lest a Man often finding the *Term of Right of Nations*, among the Authors of the *Roman Law*, should presently imagine it to be such a *Right* as is *Unalterable*, but that he might distinguish *Laws* purely *Natural*, from those that are *Natural* only in some *certain* Circumstances; and such *Laws* as are only in force among some *particular Nations*, from those which *oblige*, and are the *Ligament* of all *Human Society*; we must also observe, that if either by this *Right of Nations* improperly so call'd, or by the *Law* of any one *People*, a Method of acquiring *Property* be agreed on, without any *Distinction* between *Natives* and *Strangers*, there also *Foreigners* shall enjoy the same *Right*, and if they be hindred in the obtaining of it, it is such a *Wrong* as may give a just Occasion for a *War*.

CHAP. IX.

When Jurisdiction and Property cease.

I. That
Property
and Juris-
diction cease
when he
who had
the Right
dies and
leaves no
Successor.

I. **H**OW as well *private Properties* as *publick Jurisdictions* were originally acquir'd, and how they may be transferred, has been sufficiently declared; let us now see how they may entirely *cease*. And first, that they may cease, by being abandon'd and deserted, has been by the way already shewn; for where there is no *Will*, there is no *Property*. But there's also another manner of its ceasing, when the Subject, in which the *Jurisdiction* or *Property* is, ceases to be; I mean, when this happens before any *Alienation* is made either *expresly*, or *tacitly*, as in *Successions* to an *Intestate*. And therefore if a Person dies without any Signification of his *Will*, and leaves no *Relations* behind him, all the *Right* that he has

has *dies* with him too, and then his *Slaves* (unless some *Human Law* obstruct it) shall be *Free*, and the *People* who were under his *Government* shall be at their own *Disposal*, because they are not in their *Nature* things that may be *possess'd*, unless they *voluntarily* part with their *Liberty*; but all other *Things* belong to him who *first* gets 'em.

II. The same may be said, (a) if a *Family* that had any *Right*, happens to be *Extinct*.

III. 1. And the same is also to be understood if a *People* be *Extinct*. *Isocrates*, and after him the Emperor *Julian*, said, that *States* were *Immortal*, that is, they might *possibly* prove so. Because the *People* is one of those kind of *Bodies*, that consist indeed (b) of *separate* and *distant* Members, but are

II. So does the Right of a Family cease, if that Family be Extinct.

III. So does that of a People too, if they cease to be a People.

P 4

how-

(a) If a Family that had any Right happens to be extinct.] As that of *Denmark* was formerly. *Crantz. Vand.* 8. 23. That of *Rugenlandt*, *Crantz. Vand.* 8. 12. That of the *Pelasgi* and the *Thessalians*, *Gregor.* 1. 7. That of the *Usanhanida* in *Persia*, *Leunclav.* 16. Add to these *Leo* 1. 2. of the *Africans* of *Tarodent*; and if you please, *Ernest Cothman, Conf.* 41. n. 1, &c.

(b) Of separate and distant Members.] *Seneca* *Epist.* 102. Some *Bodies* are continual, or all of a Piece, as a *Man*: Some are compounded, as a *Ship* or an *House*, and indeed all such things as have different *Parts* join'd and united: Some consist of *Members* that are always separate and disjoin'd, as an *Army*, a *People*, a *Senate*. This is taken out of *Achilles Statius*, whose Words to *Aratus* are these, from that *Conon*, who was the Author of the Name of *Berenice's Hair*, for a Constellation at the Tail of *Leo*: *παρατήρησας ὃ Κόρυς* &c. *Conon*, the Mathematician, observed that such things are called *Bodies*, as are join'd and kept entire *ὑπὸ μιᾶς ἑξέως* by one Natural State or Connection, as *Stone* or *Wood*. Now this *ἑξέως* is that Spirit (or Principle of Union) which holds the Body together: That such Things are said to be compacted, as are not thus fasten'd by any natural Connexion, as a *Ship*, or an *House*, for the one consists of several *Planks*, and the other of several *Stones*; that other things such as a *Chorus*, are *στυλ'd διαστάτα*, distant and separate. And of these last also, there are two different sorts; for some are made up of *Bodies*, the *Quality* and *Number* of which are before fixed and settled, as is a *Chorus*; others consist of undetermined *Bodies*, as a *Crowd*,

or

however united in Name, as having ^{ἓξιν μίαν} *one Habitude* or *Constitution* only, according to *Plutarch*; *Spiritus unum*, *one Spirit*, as *Paulus* speaks. (c) Now this *Spirit* or *Constitution* in the People, is what compleatly animates and gives Being to a *Political Life*; and the first and immediate Effect of it is the *Sovereign Power*, the *Bond* that holds the *State* together, the *Vital Spirit* which so many thousands breathe, as *Seneca* expresses it. For these *Artificial Bodies* are like the *Natural*. The *Natural Body* continues to be still the same, (d) tho' its

or a People. 'Tis plain, that from hence are borrow'd what *Pomponius* has *L. verum de Usurp. & Usucap.* And what *Paulus* says, *Statuam uno Spiritu contineri*, that an Image is held together by one Spirit, or is all of one Piece, l. in rem. §. item. Where he also distinguishes between Bodies conjoin'd, and Bodies made up of separate Parts. Some others too have used these Expressions. *Philo de Mundo*, ^{ἕξις ὅτι πνεῦμα ἀνασρέφον ἐφ' ἑαυτῷ}, *Habitude is a Spirit reverting in it self*, &c. and again, ^{ἕξις ἐστὶ πνευματικὸς τὸν ὅς, δεσμὸς ἢ ἀρρήκτος}, *ἄλλὰ μόνον δυσδιάλυτος*, *Habitude or Complexion is a Spiritual Contexture, a Tie not altogether incapable of being broken, but not to be broken without difficulty.* See also *Boetius* i *Arithmet.* and pray observe, that when we speak of an *Habitude* or a *Spirit* in relation to a *People*, we don't take the Word in its strictness as *Canon* did, but *Analogically*, by way of Comparison and Similitude, as we do indeed when we call the *People* a *Body*. *Alfenus* terms this *Spirit* the *Form* or *Shape* of a thing, in l. *proponebatur D. de judiciis.*

(c) Now this *Spirit*, or *Constitution* in the People.] ^{ἡ πολιτεία, βίος πολέως}, *Government is the Life of the State.* *Aristot. Polit.* 4. 11.

(d) Tho' its Particles are perpetually upon an insensible Flux and Change.] *Alfenus* in the above cited Place gives you an Instance in a Ship. And so does *Ulpian* in l. *quid tamen D. quibus modis usus fructus amittatur.* They say, that the Ship is the same, tho' it be wholly made up again, provided the Repairs were done at several and distant Times; but the Case is quite otherwise, if it be pulled all to Pieces, and so rebuilt, c. *qui res §. aream D. de Solutionibus.* *Plutarch* in *Theseus*, ^{τὸ δὲ πλοῖον ἐν &c.} *The Vessel of thirty Oars, in which he (Theseus) with some young Gentleman had made a Voyage, and return'd in Safety, the Athenians preserv'd even to Demetrius Pha-*

its *Particles* are perpetually upon an insensible *Flux* and *Change*, since 'tis one and the same *Shape* and *Form* that remains unalter'd, as *Alphenus*, from the *Philosophers*, argues.

2. And therefore that of *Seneca*, where he says, *No Man is the same when he is old, as when he was young*, is best interpreted, as spoken of the *matter* only. (e) In the same manner as *Heraclitus* said, (*Plato* cites him in *Cratylus*, and *Seneca* in the aforesaid place) *We cannot go down twice into the same River*; which *Seneca* very judiciously explains, *The Name of the River continues, but the Water's gone*. So *Aristotle* comparing a *River* to the *People*, said the *River* retains the same *Name*, tho' one *Water* is continually coming, and another going. Nor does the bare *Name* only continue, but also that $\xi\varsigma$ *Constitution*, which *Conon* defines $\xi\varsigma\iota\nu\ \sigma\omega\mu\alpha\tau\omicron\varsigma\ \sigma\upsilon\nu\epsilon\lambda\iota\chi\eta\nu$, the *Habit of the Body that keeps its Parts together*. *Philo*, $\pi\upsilon\nu\epsilon\mu\alpha\tau\iota\kappa\acute{o}\nu\ \sigma\upsilon\nu\epsilon\chi\omicron\nu$, the *Spiritual Connection*; and the *Latins* call it the *Spirit*. Thus then

Phalereus's Days, by taking out the old decay'd *Wood*, and refitting it with such as was strong and new; insomuch, that this *Ship* became a *Precedent* to *Philosophers*, when they were canvassing whether a thing enlarged and repaired was still the same, some declaring that it was, others that it was not. In this Case so controverted by *Philosophers*, the *Civilians* have very judiciously preferred the *Affirmative* side. And *Tertullian*, who perfectly understood the *Law*, in his *B. de resurrectione Carnis*, *We have often seen a Ship torn by a Storm, or rotten with Worms, by having all its Parts and Planks fastened and mended, still the same as 'twas before, and even boasting in the Title of its new Repairs*. But you must suppose, that the *Keel* or *Bottom* remains, which indeed the Word *resoluta* in *Paulus's* Expression does imply, 1. *inter stipulantem*. §. *Sacram. D. de verb. oblig.* And this is confirm'd by what precedes in *Tertullian*, and by what follows in *Paulus*. *Philo de Mundo*, $\epsilon\gamma\omega\ \delta\eta\ \pi\epsilon\pi\epsilon\tau\epsilon\nu$ &c. Not that whose ev'ry Part does by degrees perish and decay, is it self perishable; but that whose all and ev'ry Part does suddenly at one and the same Instant perish and drop to Pieces.

(e) In the same manner as *Heraclitus*.] And *Epicharmus* in *Diogenes Laertius*.

then a *People* (according to *Alphenus*, and *Plutarch* in his *Treatise of the late Vengeance of God*) are reputed at this *Day* the same as they were a *hundred Years* ago, tho' there is not one of them now in *Being*, μέγας δὲ ἡ ποίσα κ' &c. *As long as that Society which constitutes a People, and binds 'em together in mutual Ties, preserves its Union; which are the very Words of Plutarch upon this Subject; and hence comes that Custom of Speech, that when we are addressing our Discourse to the People which are now living, we attribute to them what had happened to the same People many Ages before; as we may find both in Historians, and (f) in the Holy Scriptures, Mark x. 3. John vi. 32. vii. 19, 22. Acts vii. 38. So in Tacitus, Antony the First serving under Vespasian, puts the Soldiers of the third Legion in mind, That under M. Antony they had beat the Parthians, and under Corbulon the Armenians.*

3. It was therefore more out of *Hatred*, than *Truth*, that *Piso* in the same *Tacitus*, (g) denies that the *Athenians* of his *Time* were really *Athenians*, because so many Slaughters had quite destroy'd them, and says that these were then only the Scum of several Nations. For that Conflux of *Foreigners* had perhaps diminished something of their *Ancient Dignity*, but had not made them *another People*. Nor was he himself ignorant of this, when he objects against the same *Athenians*, how unsuccessful they had formerly been against the *Macedonians*, and how cruel and barbarous to the Subjects of their own State. But as an Alteration in its Parts does not make a *People* cease to be what they were
above

(f) In the Holy Scriptures] Add Matt. xxiii. 35. *AE* iii. 22.

(g) Denies that the *Athenians* of his *Time* were really *Athenians*.]
Julian Misopog. says the contrary of these very *Athenians*.

above a thousand Years ago; so neither can it be denied, but that it is possible for a People to be utterly Extinct. And this may be done two ways, either when the whole Body of the People is destroyed, or when that Form or Spirit (which I mentioned) is entirely gone.

IV. The Body perishes (b) either when all its Members, without which it cannot subsist, are at once destroy'd; or when its Frame and Constitution is dissolved and broken. To the first we may refer those People who are swallowed up by the Sea, as the People of the Atlantic according to Plato; (i) and some others mention'd by Tertullian; and also those who have been devour'd by an Earthquake, or by the opening of the Earth: You have Instances of such in Seneca, and Ammianus Marcellinus, and in other Authors; and those who have voluntarily destroyed themselves, as the Sidonians and Saguntines. Pliny says there were fifty three Nations of old Latium utterly lost, without the least sign of 'em remaining. But what, if of such a People so few continue living, as that they cannot make up a People? Why in this Case they retain that Property which that People had as private Persons; but not what belonged to them as a People: And this is also to be understood of any Community.

IV. Which happens when its Essential Parts are gone.

V. The Frame and Constitution of the Body is dissolv'd and broken, when the Subjects, either of their

V. When the whole Body of the People is subverted.

(b) Either when all its Members, without which it cannot subsist, are at once destroyed, or when its Frame and Constitution is dissolv'd.] Servius in Fulden. Excerpt. ad 1. Eneid. An Army is overthrown two ways, either by an utter Slaughter, or by being entirely dispers'd and routed.

(i) And some others who are mentioned by Tertullian.] Myus in Vitruvius, Helice and Buris in Pausanias, Strabo, Seneca, Nat. Quest. l. 5. c. 23, 32. and in Antholog.

their own accord, disperse themselves on the account of a *Pestilence*, or a *Sedition*, (k) or are by *Force* so scattered, as that they cannot rally and unite again, which often happens in War.

VI. When that Form is lost that makes 'em a People.

VI. The *Form* of a *People* is gone when they lose all their Rights at once, or the chief of those they had in *Common*; and this is done, either when every single Person is brought into *Slavery*, as the *Mycenæans* who were sold by the *Argives*; the *Olinthians* by *Philip*; the *Thebans* by *Alexander*, and the *Brutians* condemn'd by the *Romans* to their *Public Works*; or when, tho' they retain their *Liberty*, they are yet utterly deprived of all *Jurisdiction*. So *Livy* tells us, that the *Romans* were willing that *Capua* should be inhabited as a *Town*, but that there should be no *Corporation*, no *Senate*, no *Common-Council*, no *Magistrates*; but a wretched *Crew* without any *Public Assemblies*, and without any *Jurisdiction*; (l) and that a *Governor* should be sent from *Rome* to dispense *Justice* among 'em. And therefore [*Cicero*, in his first *Oration* to the *People* against *Trullus* says, that *Capua* had (m) not so much as the *Shadow* of a *State* left. The same may be said of those reduced into the *Form* of a *Province*,

(k) Or are by *Force*, so scatter'd.] *Philo* in his aforesaid *Treatise de mundo*, τὰ μὲν ἐν διεσπάρτοις &c. Bodies composed of distinct and distant Members, such as *Flocks*, *Herds*, *Chorus's*, *Armies*, as well as those that are made up of compacted Parts, are dissolv'd by Division and Separation. See what's said above about a *Ship*.

(l) And that a *Governour* should be sent from *Rome* to dispense *Justice* among 'em.] See *Festus* upon the Word *Præfectura*. *Velleius* l. 2. Their Rights were restor'd 'em about 152 Years after *Capua* in the *Punic War* had been reduced by the *Romans* into the *Form* of a petty *Dependent State*. Add to this the Examples produced in the Text and Notes, at B. 1. Ch. 1. §. 8.

(m) Not so much as the *Shadow* of a *State* left.] *Severus* gave to the *Alexandrians*, who had liv'd under the Direction of a small *Superintendent* without any *Publick Council*, the *Liberty* of chusing a *Senate* of their own.

vince, and of them who are subjected to another People, as *Byzantium* was to *Perinthus* (n) by the Emperor *Severus*; and (o) *Antioch* to *Laodicea* by *Theodosius*.

VII. But if the People shall only leave the Place, either of their own accord, thro' *Famine*, or any other *Misfortune*, or by *Compulsion*, as the *Carthaginians* in the third *Punic War*; if the *Form*, I mentioned, continue, (p) they do not cease to be a People, much less if only the *Walls* of the *City* be thrown down. And therefore when the *Lacedemonians* refused to admit the *Messenians* to Swear to the *Peace* of *Greece*, because their *Walls* were demolish'd, it was carried against them by the *Common Vote* of all the *Allies*.

VII. But not by only changing of Place.

VIII. 1. Nor does it signify much, under what Government they are, whether *Monarchical*, *Aristocratical*, or *Democratical*. For the *Romans* were the same People under *Kings*, *Consuls*, and *Emperors*. Nay, tho' the Government be ever so *Absolute*, yet the People are the same they were, as when they were free, whilst he who Rules, Rules as the Head of that People, and not as the Head of another. For that *Sovereign Power* which is in the King as Head, rests still in the People as in the whole, whereof the Head is a Part: So that if the King, being *Elective*, should die; or if the *Royal Family* be extinct, the *Right* of Government reverts to the People, as we have shewed already. Nether can that of *Aristotle* be objected against me, who denies that to be the same State, where the *Form* of Govern-

VIII. Nor upon the Change of Government; where also of the Rank that's due to a new King or a People lately become Free.

(n) By the Emperor *Severus*.] See *Xiphilinus* in his *Life of Severus*. *Herodian* l. 3. And to these subjoin what's below in this, B. 2. Ch. 21. §. 8.

(o) *Antioch* to *Laodicea*.] See *Zonaras*.

(p) They do not cease to be a People] As the *Geloi* transported to *Phintias*. *Diodor. Sicul. in frag. Peires*.

Government is changed, no more than the Music is the same, when the Tune is altered from the Brisk and Soft to the Grave and Serious.

2. For we must know that there may be several Forms of one and the same *Artificial* thing, as a *Batallion* has one Form of *Command*, and another of *Engagement*. Thus one Form of a *State* consists in the *Common* Enjoyment of *Laws* and *Jurisdiction*; and another in the mutual *Relation* which the *Parts* between themselves have, as well those that *govern*, as those that are *governed*. This is the *Politician's* Business, and that the *Lawyer's*: And this is what *Aristotle* understood, when he added; *but whether upon the Change of Government Debts are to be paid or not, is another Consideration, that is, a Consideration belonging to another Science; which Aristotle would not confound with Politics, lest what he blamed in others he should be guilty of himself, μεταβαίνων ἐκ γένους εἰς γένος*, skipping from one Subject to another.

3. A Debt contracted by a *Free People* ceases not to be a Debt, because they are at present under a *King*; for the *People* are the same, and they still retain a *Property* in those things that belong'd to 'em as a *People*, and hold the *Sovereignty* too, tho' it be not managed now by the *Body*, but the *Head*. And hence we have an Answer ready to that Question which does sometimes actually arise concerning his *Place* in *General Councils*, who has newly taken upon him the *Supremacy* over a *People* who were before *Free*; and that is, the same *Place* or *Rank* that the *People* themselves were entitled to; as *Philip* of *Macedon* took the *Place* of the *Phocians* in the Council of the *Amphictyones*. So on the other hand, the *Place* or *Rank* which formerly belonged to the *King*, the *Free People* shall have.

IX. But

IX. But (q) if *two Nations be united*, the Rights of neither of 'em shall be lost, but become *Common*, as the Right of the *Sabins* first, and afterwards of the *Albans*, were transferr'd to the *Romans*, and so were they made *one State*, as *Livy* expresses it. The same may be also judged of *Kingdoms* which are *Really and Truly* united, and not only by a *Treaty of Alliance*, or because they have but one *Prince*.

IX. What if two Nations be united?

X. On the contrary, it may so fall out, that what was before but *one State* may be *divided*, either by *Mutual Agreement*, or by *Force of Arms*, as the *Persian Empire* was among *Alexander's* Successors. When this happens there will be *several Sovereignities* in the room of *one*, which shall each of 'em possess its own peculiar *Right and Authority* over its respective Parts; but if any thing were held in *Common*, it shall either be administer'd in *Common*, or *proportionably* shar'd among 'em. Hither also may be referr'd that *Separation* which is made, when People by one *Consent* go to form *Colonies*. For this is the *Original* of a *New and Independent People*, & γὰρ ἐπὶ τῷ δούλοι, ἀλλ' ἐπὶ τῷ ὁμοιοι εἶ) ἐκπέμπονται, for they are not sent out to be *Slaves*, but (r) to enjoy *Equal Privileges and Freedom*, says *Thucydides*. And the same Author tells us, that a *second Colony* was dispatched by the *Corinthians* to *Epidamus*, ἐπὶ τῇ ἴσῃ καὶ ὁμοίᾳ, all upon the very same Foot. And King *Trullus* in *Dionysius Halicar-*

X. What if the same People be divided?

*(q) If two Nations be United.] As the *Celtiberi*, according to *Diodorus*, were form'd of the *Celta* and the *Iberi*. See, if you have an Opportunity, *Reinkingius* upon this Subject, l. 1. Class. 4. c. 17. n. 95. and what is cited there.

(r) To enjoy equal Privileges and Freedom.] But yet with all due Respect to the *Mother-States*, of which Respect we discours'd, B. 1. Ch. 3. §. 21. *Curtius* l. 4. The *Tyrians* founded *Carthage*, and therefore were always honour'd as their Parents.

licarnassensis says, τὸ ὅ ἀρχαὶ ἐκ παντὸς &c. For our Part we look upon it to be neither Truth nor Justice, that Metropolis's ought of Necessity, and by the Law of Nature, to Lord it over their Colonies.

XI. To whom now do those Things and Dominions belong which were once under Roman Jurisdiction, where it does not appear that they have been Alienated.

XI. 1. There's also this famous Question, among *Historians* and *Civilians*, to whom now those Things and Dominions belong, that were once Dependencies on the *Roman Jurisdiction*; several are for having 'em belong now to the *Kingdom*, as it was formerly styl'd, or to the *Empire of Germany* (it's no Matter which Name you call it by) and pretend I don't know what *Substitution* of this *Empire* in the Room of *That*; when yet it is sufficiently known that the *High-Germany*, that is, what's on the other side the *Rhine*, was all of it, the greatest Part of the Time, without the *Compass* of the *Roman Jurisdiction*. And for my Part, I think, that we ought not to presume any such *Change* or *Translation*, unless upon very sure and good Grounds. Wherefore, I say, that the *Roman People* are now the same they were heretofore; though somewhat mixt with *Foreigners*; and that the *Empire* still remains in them, as in a *Body*, where it has all along existed and lived. For whatever the *Roman People* had a *Right* to do formerly before they had *Emperors*, they had a *Right* to do the same upon the *Demise* of any *Emperor*, before any other came to the *Crown*. And the *Election* too of an *Emperor* belonged to the *People*, and was frequently made, either (f) by the *People* alone, or by the *Senate*; as for those *Elections* which were

(f) By the *People* alone, or by the *Senate*.] You have frequent Instances of *Elections*. either made or approv'd of by the *Senate* in *Adrian*, *Pertinax*, *Julian*, *Severus*, *Macrinus*, *Maximinus*, *Balbinus*, *Aurelianus*, *Tacitus*, *Florianus*, *Probus*, in *Dion*, *Spartianus*, *Capitolinus*, *Lampridius*, *Vopiscus*. Before *Aurelianus*, the *Empire* was six Months

were made sometimes by one *Legion*, sometimes by another, they were not established by any *Right* that the *Legions* had, (for from an uncertain *Title* can arise no certain *Right*) but by the Approbation of the *People*.

2. Nor does it at all argue to the contrary, that by the Constitution of *Antoninus*, all who lived within the *Dominion* of the *Roman Empire*, were made *Roman Citizens*. For by that Constitution, the *Subjects* of the *Roman Empire* did only obtain such Rights as were formerly, indulg'd their *Colonies*, *Imperial Towns*, and enfranchis'd *Provinces*, that is, they were made capable of receiving the Honours, and enjoying the Privileges of *Real Citizens of Rome*; not that (t) the *Spring and Original of Empire* was such in any other *People*, as

VOL. II.

Q

it

Months without a *Prince*, and the *Soldiery* did several Times bring their Election of him before the *Senate*. There's an Eminent Letter of *Albinus* in *Capitolinus*, concerning the Right and Prerogative of the *Senate*, and a Letter of the *Senate* in behalf of the *Gordianus's*. *Macrinus* in an Harangue of his to the *Senate*; *They have conferred on me the Empire, I accept, my Lords, the Charge of it till I know your Pleasure, and if it be as agreeable to you as it has been to the Gentlemen of the Army, I shall continue my Government.* The Emperor *Tacitus*, in *Vopiscus's* Life of *Probus*, *Me indeed, by the discreet Choice of the Army, has the Senate made their Prince.* And *Probus* in the same *Vopiscus*, *The last Year, my Lords, by a just Prerogative, did your Goodness give the World a Prince, one of your own Order, an Order who are yourselves the Princes of the World, always have been, and always will be so in your latest Posterity.* And *Majorinus* in his Address to the *Senate* mention'd in the *Novella*; *You must acknowledge, my Lords, that I was created Emperor, as well by your Free Choice, as by the Direction of an invincible Army.*

(t) *The Spring and Original of Empire.*] The *Senate* in favour of *Gordianus* in *Herodian* exhorts the *Provinces*, *πειθεσθαι Ρωμαίοις ὧν δυνάσκειον ἀνθρώπων τὸ κρεῖττον ἔχειν, αὐτάτε φίλα καὶ ὑπήκοα ἐκ παλαιῶν, τοὺς Ῥωμαίους τοὺς ἀρχαίως ἐν τῇ ἐξουσίᾳ, καὶ τοὺς ὧν ἀπὸ τῶν προγόνων, οἱ ἄλλοι ἐν φιλικίᾳ καὶ ὑποταγῇ.* And in the same Author, *Maximinus* in his Speech to the *Soldiery*, *καὶ γὰρ ἐνός ἀνδρός &c.* For our Empire is not the Property

it was in the People, who resided in the City of Rome; this was not in the Power of the Emperors to Grant, who could neither Change the State of the Empire nor the manner of holding it. Nor did it at all lessen the Right of the Roman People, that their Emperors afterwards chose to keep their Court at Constantinople, rather than at Rome; for even then also the Election, which was made by such of their own Body as dwelt at Constantinople, (whence Claudian calls the Constantinopolitans, Romans) was to be ratified by All the People; who preserv'd a very considerable Mark of their Authority (u) in the Prerogative of their City, (x) and the Honour of their Consulate, and in several other

Property of any one Man, but from long and distant Ages the common Possession of the Roman People; and the entire Fortune of the Government is lodg'd in this City. We are only chosen to share with you the Care and Administration of the Publick Concerns. Claudian speaking of Rome.

*Armorum legumque parens qua fudit in omnes
Imperium.*

*Founder of Arms and Laws, that over All
Unbounded Sway extends.*

(u) In the Prerogative of their City.] Zonaras says, that Rome had the Preference, because the Empire came from thence. Ammianus, l. xiv. talking of Rome: She is however in all Parts regarded as Queen and Mistress. Claudian, of Honorius residing at Ravenna:

*Quem, precor, ad Finem Laribus sejuncta Potestas
Exsulat, Imperiumque suis à Finibus errat?*

*To what purpose, is Power thus banish'd Home
Pray tell me, and why does Sovereign Rule
Abroad thus wander, and fly its Native Court?*

(x) And the Honour of their Consulate.] For one of the Consuls was of the City of Rome, and he too took Place of the other. Procopius in his Secret History.

ther Instances: And therefore all the Right, that those, who liv'd at *Constantinople*, could possibly have in electing an *Emperor*, depended altogether on the Inclinations of the *People of Rome*, and when they, (y) contrary to the Mind and Custom of the *Roman People*, (z) had subjected the Crown to *Irene* who was a *Woman*, not to mention any other Reasons, they justly revok'd that *Privilege*, which they had either expressly or tacitly allow'd 'em before, and by themselves chose an *Emperor* and proclaim'd him such, by the Mouth of their *Chief-Citizen*, that is, their *Bishop*; for so also in the *Jewish State*, the *First Person*, upon Failure of their *Prince*, was their *High-Priest*.

3. Now this Election was *Personal* in *Charles the Great*, and some of his *Successors*, (a) who very carefully distinguish'd their Right of *Sovereignty* over the *Franks* and *Lombards*, from that which they had over the *Romans*, as lately gain'd and upon a new Title. (b) But the Nation of the

Q 2

Franks

(y) *Contrary to the Mind and Custom of the Roman People.*] *Nero* in the xivth of *Tacitus's Annals* accuses his Mother for presuming on a Partnership in the Throne, and that the *Prætorian Guards* should swear upon a Woman's Word, a thing that would Disgrace both Senate and People. *Priscus* in *Excerpt. legat.*; & γὰρ θηλειῶν, ἀλλ' ἀρρένων ἡ τὴν Ῥωμαίων βασιλείαν ἀρχή, For the Sovereignty of the *Roman Empire* does not belong to Women but to Men. *Lampri-dius* after the Death of *Heliogabalus*: 'Twas particularly provided that no Woman should ever enter the Senate, and that whoever should attempt to introduce one should be curs'd to the Pit of Hell. *Trebellius Pollio* in *Herennianus*. *Zenobia* Usurping the Empire kept the Government in her Hands much longer than a Woman ought to have done.

(z) *Had subjected the Crown to Irene, who was a Woman.*] And had taken an Oath to Her, as *Zonaras* has it.

(a) *Who very carefully distinguish'd their Rights of Sovereignty &c.*] See the Synod of *Pomica* among the Statutes of *Charles the Bald*. And *Æmilius*, l. iii. of *Charles the Great*.

(b) *But the Nation of the Franks being afterwards divided &c.* See *Withikind*. l. i. and *Meibomius's* Observations here; and the Treaty of

of

Franks being afterwards divided into the *Western*, who now possess *France*, and the *Eastern*, who have *Germany* or *Almaine*, (*Frisengensis* calls 'em the *two Kingdoms* of the *Franks*) when the *Eastern Franks* began to *Elect* themselves *Kings* (c) (for at that Time the *Succession* to the *Crown* of the *Franks*, being as it were *Agnatic*, did not depend so much upon any fix'd and certain *Right*, as upon the *Choice* of the *People*) the *Romans*, that they might have a stronger *Assistance* and *Security*, thought fit not to take a *King* of their own, but him whom the *Germans* had created, (d) but yet with the *Reserve* of a *Right*, either to *approve* or *disapprove* the *Election*, so far as that *Affair* had any *Relation* to them.

4. And this *Approbation* of theirs us'd to be publish'd and solemnly attested by their *Bishop*, whose peculiar *Business* it was to *Crown* him. And therefore, though he who is elected by the seven *Electoral Princes*, who represent the whole *Body* of the *Germans*, has an undoubted *Right* to *Reign* over the *Germans* according to their own *Constitutions*; yet is he not but by the *Approbation* of the *Roman People* made *King* or *Emperor* of the *Romans*,

of *Charles* and *Henry*, after the *Statutes* of *Charles the Bald*, and the *Remarks* upon it of the judicious and learned *Jacobus Sirmundus*. *Wibbo* calls that *Western Division* of the *Franks*, the *Latin*, because the *Roman Language* was there in greatest *Vogue* and *Purity*, as it is to this *Day*, for the *People* on t'other side the *Rhine* use the *German Tongue*.

(c) For at that Time the *Succession* to the *Crown* of the *Franks* &c.] This was observ'd by *Priscus* in *Excerpt. legat.* and by *Reginon* ad *Ann. DCCCXVI.* *Charles the Great* in his *Will*: *If the Son* of any of these three *Sons*.

(d) But yet with the *Reserve* of a *Right*, either to *approve* or *disapprove* the *Election*.] This is certainly *Fact*, and expressly attested by *Wibbo* in his *Life* of *Conradus Salicus*.

Romans, or as some *Historians* call him, (e) *King of Italy*; and by virtue of that *Title* he becomes *Lord of All* that did formerly belong to the *Roman People*, and has not pass'd from them to the *Jurisdiction* of any others, either by *Treaties* or by *Seizure* upon the *Presumption* of its being *abandon'd*, or by *Conquest*. From whence we may easily apprehend by what *Right* the *Bishop of Rome*, when the *Throne* becomes *Vacant*, (f) grants *Investitures* to the *Fees* of the *Roman Crown*, because he holds the *Prime Rank* among the *Roman People*, who are at that *Time* intirely *Free* and *Independent*. For it is (g) usual to have what relates to a *whole Body*, executed by the *Principal Person* in the *Name* of *that Body*, as we have elsewhere said. Nor is it ill observ'd by *Cynus* and *Raynerius*, that if the *Roman Emperor*, by *Sickness* or *Captivity*, be incapable of discharging the *Offices* of his *Government*, it is in the *Power* of the *People of Rome* to appoint one in his *stead*.

XII. That the *Person* of the *Heir* is to be look'd upon to be the *same* as the *Person* of the *deceased*, in whatever relates to the *Continuance* of a *Property*.

XII. Of the Right of Heirs.

Q 3

(e) *King of Italy*] Thus the *Pope* in his *Excommunication* of *Henry* names the *Kingdom of the Teutonic*, and that of *Italy* distinctly. See *Otho's Privilege* granted to *Aldermanus*, publish'd by *Meibomius* after *Withikind's Saxonica*; and *Grantzius Saxonica*, v. in *Otho's Oath*, which *Gratian* has insert'd in his *lxiii Distinction*. *I will in Rome make no Decree or Order about any Thing that belongs to you (the Pope) or the Romans, without your own Advice and Direction.*

(f) *Grants Investitures to the Fees of the Roman Crown.*] Just as in the *German Empire*, the *Palatine* and the *Saxon* do, who are *Vicars* of the *Empire* and have it parted betwixt 'em. See *Serranus* in the *Life of Lewis XII*,

(g) *Usual to have what relates to a whole executed by the Principal Person in the Name of that Body*] So during the *Interregnum* of *Poland*, the *Archbishop of Gnesna*, as *Primate*, supplies the *King's Place*, and sits on the *Regal Throne*. *Philip Honorius* in *Dissert. de Reg. Pol.*

ty either *Publick* or *Private*, is a Matter of undoubted Right.

XIII. of
the Right
of a Con-
queror.

XIII. But how far the *Conqueror* may succeed to the *Conquer'd*, shall be explain'd *below*, when we treat of the *Effects of War*.

CHAP. X.

Of the Obligation that arises from Property.

I. The Obligation to return what's another's to the Owner: from whence and what manner of Obligation it is. We are oblig'd to restore the Things we have by us, and to do what we can that the Owner may have 'em again.

I. I. **H**AVING declared what *Right* we have over *Things* or *Persons*, as much as serves to our *purpose*, let us now see what *Obligation* to us does from thence arise. Now this *Obligation* arises either from *Things* now in *Being* (under the Name of *Things*, I shall comprehend the *Right* we have over *Persons* too, so far as 'tis such a *Right* as we have an *Interest* in) or from *Things* not in *Being*.

2. From *Things* now in *Being* this *Obligation* naturally arises, (a) that he who has in his *Hands* what belongs

(a) That he who has in his *Hands*, what belongs to me, should endeavour all he can, to have it come into my *Possession*. Among the positive Commands of the *Law* given to the *Hebrews*, there's one that enjoins the restoring a Thing found to its Owner. 'Tis in the lxxvth commanding Precept. This is founded as well upon a *Natural Equity*, as upon a Passage in *Deuteronomy* xxii. 1. St. Chrysostom, 1 Corinth. v. 8. ταῦτα ὅτι οἱ ἅπ' ἐξ ὅθεν &c. The *Laws* even of those without the *Pale* of the *Church* allow this, that if those who have Robb'd us get away, yet may we seize on our own where-ever we find it. St. Jerom upon *Leviticus*; many People think there's no harm in keeping what they have found, though it belongs to some Body else, and cry: God gave it me, and to whom must I restore it? But let 'em understand, that 'tis a Crime, very much like Theft, not to return

belongs to me, should endeavour *all he can*, to have it come into my Possession; *all he can*, I say, for he is not obliged to an *Impossibility*, nor to restore it at his own *Charge*; but he is oblig'd to signify it, that I may recover my own if I please. For as there was an *Equality* to be observed in that State, where all Things were *common*, that one as well as another might have the Liberty of using what was *common*; so as soon as ever *Property* was once introduced, there was a sort of mutual Engagement, tacitly agreed on among the *Proprietors*, that if one Man should get another Man's Goods, he should be oblig'd to restore them to the *Owner*; for if the Power of Property reach'd no farther than to have a Thing restored upon *Demand*, *Property* would have been too weakly secur'd, and the keeping of it too *Expensive*.

3. Neither is it here consider'd, whether a Man has *fairly* or *fraudulently* come by the Thing;

Q 4

for

turn what one has found. St. Austin in his ninth Sermon upon the Apostle's Words: If you have found any thing and not restor'd it, you have stole it. And a little afterwards; whoever denys what he has got of another Bodies, would if he had an Opportunity, Rob him too. Gratian has put both these Passages in *Caus. xiv. quest. v.* And the same St. Austin de Fide & Operibus: As by the Right of holding Estates, He who is in Possession of another Man's Lands is very justly reputed the Lawful and honest Proprietor, as long as he knows nothing of that Matter: But, when he's acquainted with it, and does not quit em, then is he look'd on as a pitiful tricking Fellow, and shall be justly term'd a Rogue and a Villain. To this purpose is the Law of the Westgoths, l. ix. tit. 1. c. 9. But for some weighty Reasons the Civil Law does sometimes stretch and augment this Obligation, as the Burgundian Law, l. 1. tit. vi. in the Case of a Servant who runs away. Nerva order'd all those Goods to be restor'd which Domitian had unjustly taken from the Right Owners. And Belisarius in Procopius Gothic. ii. οἷμαί δ' ἐρύωρε τὸν &c. For my part I think, that he who Sets upon him and Robs him, and he who has rot what's his Neighbour's, and doe not Voluntarily give it him again, are all one.

for an Obligation from the *Crime* or our *Fact*, is one Circumstance, and from the *Thing* it self another. The *Lacedemonians* had clear'd themselves indeed of the *Crime* or *Fact*, of breaking the *Articles*, by condemning *Phæbidas*, who contrary to their *League* with the *Thebans* had seized the *Fort* of *Cadmeas*, but they were (b) charg'd with, and as much guilty of *Injustice* in keeping the *Place*, notwithstanding all this, still in their *Hands*. And this, as it was a very singular *Injustice*, so was it also punish'd by a very singular *Providence* of *God*, as *Xenophon* has remark'd. Thus *Cicero* blames *M. Crassus* and *Q. Hortensius*, for holding part of an *Estate* by vertue of a forg'd *Will*, though the *Will* was made and drawn up without any *Fault* of theirs.

4. But because this Obligation, as by an *Universal Contract*, binds all *Men*, and creates a certain *Right* to the *Owner* of the *Thing*, hence it is, that all particular *Contracts*, as being made afterwards, do from thence receive an *Exception*. And this gives us some *Light* into that *Passage* of *Tryphoninus*, *A Rogue deposits what he had stole from me, in Scius's Hands, who knew nothing of the Fellow's Villany; now should Scius restore it to the Thief, or to me? If we respect the Giver and the Receiver only it is but just to restore the Thing entrusted to the Person who delivered it. But if we regard the Equity of the whole Affair, which includes all the Persons concerned in that Business, it ought certainly to be restored to me, because it was me who was robb'd. And then he very judiciously adds, And I'll maintain that it*

(b) Charg'd with, and as much guilty of *Injustice*.] So thinks *Diadorus*, l. xv. *Plutarch* in his *Life* of *Agésilas*, τὸν πάλιν ἐνέειρεν &c. He persuaded the *City* to take upon 'em the *Injustice*, and so to detain *Cadmæa* for themselves. You have such another *Action* of *Bajazet* in *Nicopolis*, mention'd by *Lemulavius*, l. vi.

is so far Justice to give every Man his own, in such a manner, as not to keep it from any other Person who has a juster Title to it. Now he must needs have the juster Title, who claims by a Right, as ancient as Property it self; whence it also follows, (which is in the same Tryphoninus) that he who ignorantly takes that from another in Trust, which he afterwards perceives is his own, is not obliged to restore it. And the Case which the same Author puts just before, concerning Things deposited by him, whose Goods are Confiscated, is better determined by this Principle, than what he there mentions about the Usefulness of Punishments.

5. For it's nothing to the Essence of Property, whether it arises from the Law of Nations, or from the Civil Law; for it always carries with it all things that belong to it naturally, and by its Constitution, whereof this is one, that every Man who is possess'd of another's Goods, is bound to restore them to the right Owner. And this is what Martian means, when he says, that by the Right of Nations a Man may bring his Action at Law, and recover his Goods from the unjust Possessors of them. Hence comes that in Ulpian, that he who finds what belongs to another, is in so particular a manner oblig'd to restore it, that he ought not so much as to demand *εὐπλεγειν*, any thing for finding it: Nay, all the Profits of it are to be return'd, with a deduction only of reasonable Charges.

II. 1. Of things not still Remaining, or in Being, Mankind have thought fit, that if you be enriched by what is mine, whilst I am forced to go without it, you are bound to refund as much as you have gain'd by it, because you have so much the more for what you had of mine, and I so much the less for want of my own; whereas the very Design of Property was to preserve an Equality, that

II. Where we have not the things by us, or they are not in Being we are oblig'd to restore what we have gain'd from 'em; this illustrated by several Examples.

is, that every Man might enjoy his own. It is against Nature, says Cicero, for a Man to make an Advantage of another's Loss. And in another place, Nature cannot bear that we should raise our Fortunes and our Wealth upon the Spoils and Ruin of other People.

2. There is so much Justice in this Reflection, that the Lawyers often wave the prescrib'd Rules of their Laws, and in many Cases appeal to Equity, as the Principle of greatest Certainty and Evidence. A Contract made by a Servant, who is employ'd as a Factor, shall oblige his Master, unless he has before given publick Notice, that no body should trust him. But if such publick Notice be given, and the Servant has any separate Interest and Share in that Contract, or has turn'd it over to his Master's Advantage, such Notice shall be deem'd a Fraud. For I think, says Proculus, that any Man who would gain by another's Prejudice, acts fraudulently, where the word Fraudulently, implies whatever is done contrary to natural Right and Equity. He, who by the Mother's Order gives in Bail for the Son's Defendent, can have no Action of Commission against the Defendent, because indeed he did not properly act for him, but only engag'd himself on the account of the Mother. But however, according to Papinian's Judgment, an Action (an Equitable one, if I am not mistaken) for Business done shall lie against the Defendent, because 'tis with the Security's Mony that he is discharg'd.

(c) 'Tis against Nature for a Man to make an Advantage of another's Loss.] Cassiodore 10. 16. We now-a-days confess that 'tis a very ungrateful part, something very shocking, for one to be pleas'd with another's Misfortune.

So the *Wife* who gives her *Husband* *Mony*, which she may by *Law* demand again, has a *Real* and *Equitable* Claim upon the thing that was purchas'd with that *Mony*: *Because*, says *Ulpian*, it cannot be denied, but that the *Husband* is the *Richer* for it, and then the *Question* is, what he has got that was bought with his *Wife's* *Mony*.

So again, if you have spent any *Mony*, which my *Servant* has stole from me, thinking it to be his own, I have a *Personal Action* against you, as much as if you your self had got any thing of mine unjustly. *Minors* are not, according to the *Roman* *Laws*, obliged to pay what they borrow; but yet if the *Minor* be the *Richer* for it, an *Action* in *Equity* shall lye against him.

Thus if another *Man's* *Goods* are pawned, and the *Creditor* sells 'em, the *Debtor* is discharged from the *Creditor* to the value of the *Mony* received for 'em; because, says *Tryphoninus*, be the *Obligation* what it will, since the *Mony* rais'd was upon the *Debtor's* account, it is more *equitable* that it should advantage the *Debtor*, than be to the *Profit* of the *Creditor*; but the *Debtor* shall at the same time be obliged to indemnify the *Buyer* from procuring *Gain* by another's *Loss*. And if the *Creditor* has taken more *Fruits* from his *Debtor's* *Ground* than his *Interest* amounts to, he must allow 'em as receiv'd in part of *Payment* of *Principal*.

So if you have dealt with my *Debtor*, not as he is indebted to me, but thinking him to be so to some other *Person*, and borrow my *Mony* of him, you are obliged to pay me; not because I lent you any *Mony*, (for this could not be done but by *mutual* *Consent*) but because my *Mony* is in your *Hands*, it is but just and honest that you should restore it me.

3. Our

3. Our Modern *Interpreters* of *Law* and *Right*, do very *Judiciously*, from these *Positions*, form their *Judgment* of other like *Cases*: As for instance, where a *Man's Goods* are offer'd to *Sale*, when he is out of the way, which had he known it, he would certainly have excepted against, he has certainly a *Title* to the *Mony* his *Goods* were sold for; and where one lends a *Father* *Mony* for the *Maintenance* of his *Son*, if the *Father* becomes *Insolvent*, he may have an *Action* against the *Son*, provided that this *Son* is possess'd of any thing that was his *Mother's*.

These two *Rules* being perfectly understood, there will be no difficulty in answering such *Questions* as are often proposed both by *Lawyers* and *Casuits* in this *Affair*.

III. *How* who has honestly got what's another's, is not obliged to restore it, if it perishes, or be lost.

IV. *But* he is obliged to restore the Fruits or Produce of it that remain or are in Being.

V. *Even* those that are spent and wasted, unless it appears that had he not had 'em by him, he would have had no occasion to have spent such things.

III. For in the *first* place, it's plain from hence, that he who is come by a thing *honestly*, (for he who comes by it otherwise is inditable, not only for the thing it self, but punishable for his having it) is not obliged to make any *Restitution* if the thing be gone, because he neither enjoys the *Substance*, nor any *Benefit* by it.

IV. *Secondly*, That whoever has come *honestly* by a thing, is obliged however to restore all the *Produce* of it that he has still remaining; the *Produce* I mean of the *Thing*; for as to the *Produce* of his own *Labour* and *Industry*, tho' without that thing there had never been any such *Produce*, yet does it not any ways belong to the *Thing* it self. The Reason of this *Obligation* arises from *Property*, for he who is the *Owner* of the *Thing*, is naturally the *Owner* of all its *Produce*.

V. *Thirdly*, Whoever has *honestly* got what's another's, is obliged to give *Satisfaction*, not only for the *Thing* it self, but also for the *Produce* of it, tho' that *Produce* be spent and gone, if it appear that he must otherwise have spent and consum'd

as much of his own; because he is look'd upon to be so much the *Richer* for it. Thus 'is *Caligula*, in the beginning of his Reign, highly commend- ed, that to those to whom he restored their *Crowns*, he also restored the *Revenues* of 'em that were in *Arrears*.

VI. *Fourthly*, That he is not obliged to make good the *Fruits*, or *Produce*, which he neglected to take, because he has neither the *Thing* it self, nor any thing else in its *Room*.

VII. *Fifthly*, If such a *Possessor* shall give to another what was given him, he is not obliged to *satisfie* the *Owner* for it, unless it appear, that if he had not given *that*, he must have given as much some other way; for then the sparing of his own *Stock* will be reckon'd a matter of *Gain* and *Advantage* to him.

VIII. *Sixthly*, If he *Bought* what he has *Sold*, he is obliged to return no more than the *overplus* of what he fold it for; but if what he sells was *given* him, he is obliged to pay what he gets for it, unless perhaps he has squander'd away the *Money*, which otherwise he would not have been so lavish of.

IX. I. *Seventhly*, That *another* Man's *Goods*, tho' *honestly* paid for, are to be restored, nor can he demand a *Reimbursement* of his *Charges*; to which *Rule* I think it proper to add this *Excepti- on*, (d) unless where the *Proprietor* could not, in all proba-

VI. But not those which he neglected to take the Advantage of.

VII. That such a one is not oblig'd to make Resti- tution for what he has given away; this with a Distinction.

VIII. Nor if he only sells what he bought; this with a Dis- tinction too.

IX. When he who has fairly bought what's ano- ther's, may claim all, or part of what is cost him.

(d) Unless where the *Proprietor* could not, in all probability, have recover'd the *Possession* of his own, without some *Expence*.] In *Terence's* *Self-Tormentor*, *Act* 4. *Scen*, 4.

Sed illud quod tibi

Plci de Argento quod ista debet Bacchidi;

Id nunc &c.

But

probability, have recover'd the Possession of *his own*, without some *Expence*; as, suppose it was in the Hands of *Thieves* and *Pirates*. For in this case, what the *Owner* would have gladly *spent* to have it *again*, may very fairly be *deducted*. Because the *actual* Possession, especially when not to be recover'd without *difficulty*, is capable of being Rated at a certain Value, and the *Proprietor*, when Reinstated in it, is adjudg'd to be, on this account, proportionably the *Richer*. And therefore, tho', according to the ordinary course of the *Law*, it signifies nothing to pretend to *buy* what's already *our own*, all such *Bargains* being entirely void; yet does *Paulus* affirm, that such a *Purchase* is *binding*, if it be first *agreed* upon that we shall *pay* for what another has of *ours* in his Hands. Nor do I think it at all material *here*, whether the Thing was *bought* (e) with a Design to *restore* it to the *Owner*, in which case some are of Opinion, there does an *Action* for Cost arise, but others deny it, since an *Action* for *Business* done results from the *Civil Law*, and has none of those Foundations upon which *Nature* builds an Obligation. Whereas our *Inquiry* here is after what is *Natural*.

2. Not

But for the Money, I told you, your Daughter owes to *Bacchis*, that must be paid down upon th' Nail. Neither will you, I presume, shift it off by saying, *What is't to me? Did she lend me the Money. Was't done by my Orders? What had she to do to pawn my Daughter without my Consent?* As for that, *Chremes*, the old Saying is true, *You may have much Law o' your side, and but little Equity.*

where also see *Engrasius*. This piece of Justice is approv'd too by the *Hebrew Masters*, and by the *Wifigoths*, l. 1. tit. 9. c. 9. and c. 15. Alc. 3. Præf. 29. Menoch. 5. Præf. 29. num. 26. Strach. part 2. num. 18.

(e) *With a design to restore it to the Owner.* Spec. Saxon. 1, 37. Landrecht tit. 15.

2. Not unlike this is what *Ulpian* writes of *Expences* laid out upon a *Funeral*, that a prudent and equitable Judge does not observe there what is strictly performed, and what the *Rigour* of the *Law* would allow, but administers Justice with a greater Liberty, since the *Nature* of the *Action* will indulge him in it; and what he says in another place, If a Man has done my Business, not so much out of Respect to me, as for his own Profit, and has been at some Charges about it, he shall have his *Action* against me, not for what he laid out, but for what *Advantage* I have made of it. Thus too the Owners of such Goods, as in a Storm are thrown over-board to lighten the Ship, come in for a Share with them whose Effects were by that means preserved; because he who has saved what would otherwise have been lost, seems to be so much the *Richer* for it.

X. *Eighthly*, He who buys another Man's Goods, cannot return them upon the Hands of the Seller, and demand his Money back, because as soon as ever those Goods came into his Power, (as we have said already) there commenced in him an *Obligation* to restore them to the Owner.

XI. *Ninthly*, Thus he who has got a thing, and knows not the Owner of it, is not obliged by the *Law of Nature* to give it to the Poor, (f) tho' this would be a kind Religious Action, and what is a *Custom* in many Places very commendably establish'd. The Reason is, because by the *Laws of Property*, none but the *Proprietor* can claim a *Right*. And to the Party here concern'd, the not appearing of any Owner is the same as if there really were none.

X. If I buy what does not belong to him who sells it, I must not return it to him. but to the Owner.

XI. If I have got a thing in my Hands and do not know the Owner, I am not obliged to part with it to anybody.

XII. That

(f) *Tho' this would be a kind Religious Action*] St. Chrysostom in the Place just mention'd.

XI. If I take a Fee upon a dishonest Account, or for doing a Service that I am obliged to, I am not by the Law of Nature bound to restore it.

XIII. The Opinion, that the Property of things which consist of Weight, Number or Measure, may pass without the Consent of the Owner, refused.

XII. That by the *Law of Nature* whatever is taken either upon a *Dishonest Account*, or for an *Honest Piece of Service*, which however he was of himself obliged to do, is not to be restor'd, tho' such a *Restitution* is what some *Laws* have very justly Enacted. The Reason is, because no body is bound to part with any thing, unless it belongs to some other; but here the *Property* is entirely transferr'd by the *Voluntary Act* of the former Owner. (g) The Case indeed will be otherwise, if there be any *Fault* in the *Manner* of taking it; as for Instance, if we extorted it by *Threats*, or by *Violence*: For this is another *Principle of Obligation*, not to our Purpose now.

XIII. Let us also add, that *Medina* is mistaken when he asserts, that the *Property* of other People's Goods may pass to us without the Owner's Consent, provided they are such things as are usually valued by *Weight, Number and Measure*. Because tho' things of this Nature admit of an *Equivalent*, that is, may be returned by something of the same kind; but even in this Case Consent must be first had, or there must, by virtue of some *Law or Custom*, be room to believe that there has been such a Consent, as in what we borrow; or when a thing is spent and consum'd, and so cannot be actually produced. But without such a Consent either express'd or presum'd, or without great *Necessity*, such *Equivalents* are not to be allow'd of.

(g) The Case indeed will be otherwise, if there be any Fault in the manner of taking it, as for Instance. if we extorted it.] St. Austin in his 54th Epist. makes a very excellent Distinction in this Affair.

C H A P. XI.

Of Promises.

I. I. **W**E now come in the Order of our Subject to treat of *Obligations* arising from *Promises*; where we presently meet *Franciscus Connanus*, an eminent Scholar, opposing us. He maintains this Opinion, that those *Promises* which are not made upon mutual *Agreement*, are not binding, either by the *Law of Nature*, or *Nations*; and yet he owns, that they may however be justly performed, if the thing promised be such as might, had no *Promise* ever been made, *Honestly* and conformably to the *Rules of some Virtue*, be done.

I. The Opinion which maintains that no Promises are naturally obliging, refused.

2. To confirm his Opinion, he not only brings the *Testimony* of some *Lawyers*, but also these *Reasons*. *First*, That he who believes a Man who promises *rashly*, and without any *cause*, is as much to blame, as he who himself makes such a *vain Promise*. *Secondly*, That it would be very dangerous to most Men's *Fortunes*, if they were obliged to perform all their *Promises*, which they generally make, more out of *Ostentation*, than a real *Intent* to perform them; and *lastly*, That it is reasonable to leave some things to every Man's *Honesty*, and not to confine him to a *Necessity of Performance*. It is reputed base not to perform what we have promised, not that it is really *unjust*, but because it argues a *Lightness* in the *Promiser*. He also urges the *Testimony* of *Cicero*, who said, that those *Promises* are not to be performed, which are of no *Advantage* to them who receive 'em, or are more *prejudicial* to us, than of *Service* to them. But if any thing be already performed, he would have the Party not engaged to *All* that he had

promised, but only so far as will make the other Person some little *Amends* for his Disappointment. And as for *Agreements* that are not of *themselves* *Obligatory*, that they receive their *Force*, either from the *Contracts* in which they are inserted, or to which they are *joined*, or from the actual *Delivery* of the *Thing* it self: Which produces on the one side *Actions*, on the other *Exceptions*, and a *prohibiting* any future *Claim* to what has been so *deliver'd*. And that such *Agreements* as do *oblige* according to the *Laws*, as those that are made by way of *Stipulation*, and some others, receive all their Power from the *Benefit* of the *Laws*, whose *Efficacy* is such, as to make that which *in it self* is only *honest* or *reputable*, to be also *necessary* and *binding*.

3. But this Opinion (of *Connanus*) taken so generally, as he expresses it, cannot be *consistent*. For *first* it would thence follow, that the *Articles* of *Agreement* made between *Kings* and *People* of divers Nations, so long as there was nothing performed on either side, were of *no* force, especially in those Places where there are no set *Forms* of *Treaties* or *Contracts*. Nor indeed can any Reason be given, why the *Laws*, which are, as it were, the Common *Covenant* and *Promise* of the *People* (and so they are called by *Aristotle* and *Demosthenes*) should give such an *obliging* Force to *Agreements*; and yet that a Man's own *Will*, endeavouring by all means possible to *oblige* it self, cannot do the same thing, especially in a Case where the *Civil Law* offers no *Obstruction*. Besides, since the *Property* of a *Thing* may be *transferred*, by the *Will* being sufficiently declared (as we said before) why may we not therefore have the same *Power* over our selves, either to transfer a *Property* that belongs to us (which *Power* is less than *Property* it self) or to do any thing else, since we have as

much

much Right over our *Actions*, as we have over our *Goods*?

4. (a) And to this do the *Learned* agree; for as the *Lawyers* say, Nothing is more natural, than that the *Will* of the *Proprietor* desiring to transfer his Title to another, should have its intended Effect. In like manner it is said, that nothing is so agreeable to Human *Faith*, as to observe whatsoever has been mutually agreed upon. So an *Order* for *Payment* of *Mony* promised, tho' there were no other Reason alledged why it should be *due*, but the *free Consent* of the *Promiser*, is said to be agreeable to Natural *Equity*. And *Paulus* the *Lawyer* says, that he does *naturally* become a *Debtor*, who by the *Law of Nations* is obliged to pay, because we *relied* upon his *Credit*. Where this Word *obliged* implies a certain *moral Necessity*. Neither may we allow what *Connamus* says, that we are then reckon'd to *rely* upon a *Man's Credit*, when the thing promised ceases to be *entire*, or has something of it already performed by one Party. For *Paulus* in that place was treating of a *Personal Action* brought for a thing *paid* where it was not *due*, which is entirely void, if the *Payment* was made upon any *Agreement* whatever. Because then, even when the *Mony* was not yet laid down, one was oblig'd by the *Laws of Nature and Nations* to discharge one's *Promise*; tho' the *Civil Law*, to prevent the occasions of litigious Suits, gives no particular *Encouragement* to *demand* it.

5. And *M. Tully* in his *Offices*, attributes so great a power to *Promises*, that he calls *Faithfulness*

R 2

the

(a) And to this do the *Learned* agree.] Inasmuch, that the *Hebrews* maintain that *Silence*, in an *Affair* that will not admit of a *Delay*, has the Force of a direct *Engagement*. *Baba Kama*, c. 10.

§. 4.

the Foundation of *Justice*, which also *Horace* calls the *Sister of Justice*; and the *Platonists* often term *Justice* ἀληθείαν, *Truth*; which *Apuleius* has translated *Fidelity*, or the being as good as one's *Word*. And *Simonides* makes *Justice* to consist not only in returning what we have received, but also in *speaking Truth*.

6. But to make this plainer, we must carefully distinguish the three Degrees or Manners of *speaking* about things future, which either really are, or at least are thought to be in our own Power.

II. A bare Assertion does not lay one under an Obligation.

II. The first Degree, or Manner, is a bare *Assertion*, signifying what we intend hereafter in the mind we are now in. And that this may not be defective, it is required that we *sincerely* express what at that present time we think, but not that we continue in that Thought. For the Mind of Man has not only a natural Power, but also a Right to alter a *Design*; and if there be any *Fault* in the *Change*, as it often happens, that is not essential to the *Change*, but proceeds from the Subject of it, because perhaps the first Opinion was the better.

III. That a single Promise does naturally oblige, but no Right arises from thence to the Person who receives it.

III. The second Manner, when the *Will* determines it self for the Time to come, is by giving some positive *Token*, that sufficiently declares the Necessity of its *Perseverance*. And this may be called a *Free Promise*, which setting aside the *Civil Law*, obliges either *absolutely* or *conditionally*; but yet gives no peculiar *Right* to him to whom 'tis made. For it happens in many cases, that we may lay our selves under an *Obligation*, and at the same time give no *Right* to any other over us, as appears in the *Duties* of *Charity* and *Gratitude*; and of this kind is the Duty we are talking of, of *religiously keeping* our *Words*. And therefore no Man can by the *Law of Nature*, from such a Promise demand or detain what belongs to the Person so promising. Nor can

be

he be compelled by that Law to perform what he has promised.

IV. A third Degree is, when to this Determination of our Will, we add some outward Sign declaring our Consent and Readiness to transfer our own Right to some body else. And this is a complete Promise, as having the same Effect as the Alienation of a Man's Property. For it is either the means of alienating a thing, or at least the Alienation of some part of our Liberty. To the former belong our Promises to give, to the latter our Promises to do something. And of this the Scriptures give us a notable Example, where they tell us, that (b) God himself, who cannot be obliged by any Law, would act contrary to his own Nature, not to perform what he promised, Neh. ix. 8. Heb. vi. 18. and x. 23. 1 Cor. i. 19. and x. 13. 1 Thess. v. 24. 2 Thess. iii. 3. 2 Tim. ii. 13. whence it is plain, that to perform Promises is a Duty arising from the Nature of Immutable Justice, which as it is in God, so it is in some measure common to all such as have the use of Reason. Add to this Solomon's Judgment in the Affair, Prov. vi. 1. My son, if thou hast been surety for thy friend, thou hast tied up thy hands to a stranger, thou art ensnared by the words of thy mouth, thou art taken by the words of thine own mouth. And from hence it is, that a Promise is called by the Hebrews אֶרְבֹּנָה, a Bond or a Chain, and is (c) compared to a Vow, Num. iii. 4, 5, 6. And so is the Original of the Word ὑπόχρεσις observ'd by Eustathius upon the second of the Iliads, ἀλέσκει γὰρ πῶς καὶ καλέχαι τὸ ὑποχρόμενον ὁ τὴν Ἐπαγγελίαν δεξάμενος, He who receives the Promise,

IV. What that Promise is, from whence a Right to another does arise.

R 3

(d) Seizes

(b) God himself.] So Baldus, l. 1. de D. pactis.

(c) Compared to a Vow.] Men do as it were enter into a Covenant with the Gods, by making their Vows to 'em. Schol. Horat.

(d) *seizes upon, and binds the Promiser*: Which is very well express'd by Ovid in his second Book of *Metamorphoses*, where the *Promiser* says to the *Promised*, *Vox mea facta tua est*, *My Word is become yours*.

2. These things being premised and understood, we may easily answer *Connanus's* Arguments. For what the Lawyers say of a *bare Promise*, has respect only to (e) what was introduced by the *Roman Laws*, which made a *Stipulation* (or *Covenant*) an undoubted Sign of a *deliberate Mind*. Nor do we deny but that such Laws are in force among other Nations. *What Law does oblige us to perform a meer Promise?* says *Seneca*, speaking of a *Human Law*, and (f) a *Promise* under no solemn *Form*.

3. But there may be *naturally* other signs of a *deliberate Mind*, besides this *Stipulation*, or any other thing like it which the *Civil Law* requires to create an *Action*. And indeed, as for that which is made *without Deliberation*, we do not allow it to have any Power of obliging at all, as *Theophrastus* has observed in his Book about *Laws*. Nay, and what is done *deliberately*, but not with an *intent* thereby to *transfer* our own proper Right to another, we deny that from thence there arises

Natu-

(d) *Seizes upon, and binds the Promiser.*] From hence they are called the *Bonds* of our Credit. *Donat. ad Eunuch.*

(e) *What was introduc'd by the Roman Laws.*] 'Tis very judiciously observed by *Paulus*, *Sent. l. 11. tit. 14.* *If there be only a bare Promise to pay Interest, it signifies nothing, for among the Roman Citizens a bare Promise bears no Action.*

(f) *A Promise under no Solemn Form*] That is, not *ratified* as the Law directs in such Cases. So in his 19th *Epist.* he makes this Distinction. *Fam non promittunt de re, sed spondent. They now do not Promise, but Engage for you.* A *Bargain* and, an *Engagement* is called by *Paulus* a *Solemnity of Words*, *l. 5. Sent.* and by *Cajus tit. de Obligationibus qua ex consensu fiunt.*

Naturally a Right to any Man to demand any thing of us, tho' we acknowledge, that we ought, not only for our *Reputation*, but also by a sort of *Moral Necessity*, to perform what we have thus promised; but as to that of *Cicero*, we shall treat of it below, when we come to speak how *Contracts* are to be understood; but now let us see what *Conditions* are required to make a Promise valid and compleat.

V. 1. *First*, It is required that the Promiser should have the use of his *Reason*; therefore the Promises of *Madmen*, *Ideots* and *Infants* are void. But the case of *Minors* is not the same; for tho' they are supposed not to have a perfect Judgment, as are also *Women*, yet that is not always so, nor is it of it self sufficient to render their *Acts* invalid.

V. First, to make a Promise compleat, it is required that the Promiser have the use of his Reason; where the Law of Nature is distinguish'd from the Civil Law in the case of Minors.

2. But at what Years a Child comes to the Use of Reason, cannot be certainly determined; but must be judged either from his *Daily Actions*, or from the general Customs of every Nation. Among the *Hebrews*, a Lad after 13 Years of Age might oblige himself by any Solemn Promise, and a young *Woman* after twelve. But the *Civil Law*, for very good Reasons, declares many Promises of *Pupils* and *Minors* void, not only among the *Romans*, but the *Grecians* too, as is observed by *Dion Chrysostom* in his 75th Oration: And some they qualify'd by the Benefit of a *Restitution*; but these are the peculiar Effects of the *Civil Law*, and therefore have nothing common to the *Law of Nature* and *Nations*, unless it be that where they are received, there it is natural that they should be observed. And therefore, if a *Foreigner* makes a Bargain with a *Native*, he shall be obliged by the *Laws* of his State, because he who enters into a Contract in any place, is a Subject for the Time

being, and must be obedient to the Laws of that Place.

3. But it is quite a different case, if the Bargain was made either upon the *Seas*, or in a *Desert Island*, or by Letters between Persons at a *Distance*. For such *Contracts* are to be regulated only by the *Law of Nature*; as also such *Agreements* as pass between *Sovereigns*, consider'd as *such*. For what they do in a *private Capacity* may by the *Laws* be made *void*, when it is in their *Favour*, but not when they will be *Sufferers* by it.

VI. Whether a Promise given thro' Mistake does Naturally oblige us, and how far it does so.

VI. 1. As for a Promise made by an *Error* or *Mistake*, the Point is more intricate and perplexing. For 'tis usual to distinguish an *Error*, which concerns the *Substance* of the *Thing*, from that which does not concern it. Whether any *fraud* gave Occasion to the *Promise* or not. Whether the *Person* with whom we deal was *Privy* to, or had any *Share* in that *Fraud*; whether it be an *Act* of strict *Right* and *Justice*, or only such as our *Honesty* and *Reputation* would incline us to. For the *Opinions* of *Writers* differ according to the *Variety* of these *Cases*, declaring some *Acts* to be *void*, and others *valid*; but so, that 'tis wholly at the *Pleasure* of the *Person injured*, either to *repeal* or *reform* 'em. But most of these *Distinctions* come from the *Roman Laws*, as well from the old *Civil Law*, as from the *Prætorian*, and some of them are not perfectly *true*, or well *digested*.

2. But it opens us a way to find out the *natural Truth*; for as concerning the *Force* and *Efficacy* of *Laws*, this has been ever allowed by the general Consent of all People, that (g) when a *Law* is founded upon the *Presumption* of a *Fact*, that

(g) When a Law is founded upon the Presumption of a Fact.] See an Instance in l. Mancipia. C. de Servis fugitivis. in Gail. l. 1. obs. 11. 1. 7. and in Melmaus ad Consuet. Paris. tit. 1. Sect. 13. Gl. 3.

that was not really so, then that Law shall not oblige, because the Truth of the Fact failing, the whole Foundation of the Law fails with it. And when a Law is founded upon such a Presumption, may be gathered from the Subject of the Law, from the Words of it, and from several other Circumstances. So we may say too, (b) that in case a Promise be made upon the Presumption of a Fact, that was never done, that Promise is naturally of no Force; because the Promiser did not give his Consent to the Thing Absolutely, but upon such and such Conditions, as were really not in Being. To which we may refer that Question in Cicero de Orator. 1. of him who falsely believing his own Son to be dead, had made another his Heir?

3. But if the Promiser were negligent, in searching out the Truth of it, or in expressing his own Sense, and thereby caused any Damage to the other; the Promiser shall be obliged to repair it, not by virtue of the Promise, but on the Account of the Damage occasioned through his Neglect, of which we shall treat more by and by. But if there were a Mistake in the Promiser, and yet that Mistake was not the Occasion of the Promise, the Act shall be valid, because there was nothing wanting of the true Consent; but in this Case also, if the Person to whom the Promise was given, did by any Fraud of his occasion that Mistake, he shall be obliged to repair any Damage that shall arise to the Promiser from that Mistake, from that other Branch of the Obligation. But if the Promise was but in part caused by a Mistake, the Promise shall as to the rest stand good.

VII. 1. There's

(b) In case a Promise be made upon the Presumption of a Fact that was never done.] Seneca de benefic. iv. c. xxxvi. He's a madman that stands to a Mistake.

VII. 4
Promise made thro' Fear obliges; but he who caused that Fear is bound to discharge or indemnify the Person promising.

VII. 1. There's no less perplexing a Question about a *Promise* made through *Fear*; for here too People generally distinguish between *Fear*, that's extremely great, either *Absolutely*, or with Regard to the *Person* apprehensive of it, and that which is *slight* and *inconsiderable*; whether occasioned *justly* or *unjustly*; whether by the *Person* who receives the *Promise*, or by some other. They also distinguish between such Acts, as may be done without any great *Detriment* to our selves, and such as are very *Burthensome* and *Difficultly* to be *comply'd* with; and according to these Differences it is, that some Acts are said to be *void*, others *revocable* at the *Will* of the *Promiser*, and others to be wholly *remitted*; concerning every one of these Cases, there are great Varieties in Opinions.

2. For my part I wholly agree with them, who hold, that, setting aside the *Civil Law*, which sometimes quite *takes away*, and sometimes *lessens* the *Obligatory Power*, he who through *Fear* has *promised* any Thing, is *obliged* to *perform* it, because his *Consent* here was *Absolute*, and not *Conditional*, as in the Case of an *Error*. For as *Aristotle* has well observed, he who through *Fear* of *Shipwrack*, throws his Effects *over-board*, would gladly preserve them, provided there was no *Storm*, and he in no *Danger* of being *lost*; but upon a serious Consideration of the Time and Place, he absolutely resolves to *part with* his Goods, rather than be himself *destroy'd*. But yet I must allow that if the *Person promised*, did cause not a *just*, but an *unjust Fear*, and this a very *small* one too, yet if the *Promise* was, upon this Motive, made, he is obliged to discharge the *Promiser* if he desire it; not that the *Promise* is in it self *void*, but for the *Satisfaction* of an undeserved *Wrong*. But what *Exceptions* the *Law of Nations* allows in this Case, (i) shall

(i) shall be explained below in it's proper Place.

3. But that some Acts are made void (k) on the Account of *Fear*, which *Fear* was occasion'd not by *him*, with whom we were dealing, but by *another*, is an *Effect* of the *Civil Law*, which often nulls, or revokes Acts, though freely done, if the *Doer* be of weak Judgment. And here what we have said before concerning the *Force* and *Efficacy* of the *Civil Law*, we would have again remember'd. But what force *Oaths* add to the Confirmation of *Promises*, shall be shewed hereafter.

VIII. 1. To make a *Promise* firm, it is requisite, that the *Thing promised* either now is, or may be in the Power of the *Promiser*; wherefore in the first Place, it is certain, that no *Promise* can oblig'd us to that, which is in it self unlawful; for no Man has a Right to any such Thing, or can have. But a *Promise* (as we said before) receives its *Force* from the *Right* of the *Promiser*, nor does it reach any farther. *Agessilaus* being once challeng'd upon his *Promise*, answered; *ναὶ ὅντα, εἰ δ' ὅτι δίκαιον. εἰ δ' ἢ μὴ, ἔλεξα μὴ, ὁμολόγησα δ' ἔ;* very well, if it is just; but if not, I only said it, I did not promise it.

VIII. To make the *Promise* valid, it must be in the Power of the *Promiser* to perform it.

2. If the Thing be not now in the Power of the *Promiser*, but may in time be, then it shall lie in *Suspence*; because the *Promise* must then be suppos'd to be upon

(i) Shall be explain'd below in its proper Place.] In this Book, ch. xviii. Sect. 19. and B. iii. ch. xix, Sect. 1.

(k) On the Account of *Fear*, which *Fear* was occasion'd not by him with whom we were dealing, but by another.] Seneca following *Nature*, Controv. I. iv. Contr. xxvi delivers himself thus, *What is transacted through Compulsion and Necessity may be repeal'd, if this Compulsion and Necessity was occasion'd by the Party concerned in the Bargain: For 'tis nothing to me, says he, how you are impos'd upon, if I don't impose upon you. It must be my Fault, if I am to suffer for it. Compare with this what you have lower, B. iii. ch. xix. Sect. 4.*

upon this Condition, that it *ever* be in his Power. But if that very *Condition*, by which the Thing is to come into the *Promiser's* Power, be in his Power too, then the *Promiser* shall be obliged to do whatever is *morally* reasonable for promoting the Performance.

3. But the *Civil Law*, for a common *Advantage*, nulls many *Promises* of this kind also, which the *Law of Nature* would oblige us to; as that of a *Man*, or *Woman* already *married*, who Promise some *Future Match*, and several other Promises made by *Minors*, and *Children* while under their *Parents*.

IX. Whether a Promise made on an ill Account be valid; this explain'd by a Distinction.

IX. Here it is frequent to inquire, whether a *Promise* made to do an *Act* Naturally and in it self *Faulty* and *Criminal*, can be *valid* by the *Law of Nature*; as if a *Man* should promise a *Reward* to him that should *kill* another: That this is a *Criminal Promise*, is plain enough from this, in that it was made designedly to *tempt* a *Man* to do what he ought not to do. But yet not every Thing, that is done upon a *wrong Principle*, does lose the Effect of a *Just Right*, as appears from a *profuse* and *extravagant Deed of Gift*. Here is the difference, as soon as ever the *Gift* is made, that *Evil* ceases, for the *Gift* brings no *Guilt* to, nor does any ways prejudice the *Receiver*. But in *Promises* made with an *ill Intent*, the *Evil* remains till the *Crime* is committed; for *so long*, the very *fulfilling* of the *Promise*, being an *Inducement* to what's *Ill*, carries a *Stain* along with it, which cannot begin to *wear off* till the *Ill* it self be accomplish'd: Whence it follows, that the *Force* and *Efficacy* of such a *Promise* did continue in *Suspence* till that time, as I said before concerning the Thing *promised*, which is not in our Power; but the *Crime* being *perpetrated*, the *Obligation* immediately exerts its *Right*, which from the beginning

was

was not intrinsically wanting, but was hindred by an accidental Evil. An Instance we have of this in *Judab*, *Jacob's* Son, who performed his *Promise* to *Thamar*, whom he reputed an *Harlot*, sending her the promised *Reward*, (l) as her *Due*. But now if the *Promise* be occasioned by the *Injustice* of the *Person* to whom it is given, or the *Bargain* be *unfair*, and there's any *Inequality* in the *Agreement*, how this is to be amended, is another *Question*, (m) of which we shall treat very quickly.

X. But when a *Promise* is made on the Account of something already due, it is not therefore the less due, if we respect *Natural Right*, according to what we said above concerning our accepting what is another's. Because a *Promise* is a *Natural Debt*, even without any *Prior Engagement*. But here also any *Damage* that arises by *Extortion*, or any *Inequality* in the *Agreement* shall be repaired, according to the *Rules* which shall be laid down a little lower.

XI. As to what concerns the manner of promising, it requires, as I said before concerning the transferring of *Posterity*, an *External Act*, that is some sufficient *Sign* to testify the *Consent* of the *Will*, which may sometimes be done by a *Nod*, but generally by *Word of Mouth* or *Writing*.

XII. But we may also be obliged by what another Man does, if it appears that we have deputed and impowered him to act for us, either (n) as our *Proxy* in that particular *Affair*, or by vertue

X. What we are to judge of a Promise, that entitles us to something due before.

XI. The manner of making a firm Promise in our own Person

XII. The manner of confirming a Promise made by others, and of Embassadors who go beyond their Commissions.

(l) As her Due.] By the Law of Nature, I mean, which was the Rule that Folks then liv'd by. C. Aquilius was of another Opinion from the Civil Law, as is testify'd by Valerius Maximus, l. viii. c. 11. n. 2.

(m) Of which we shall treat very quickly] c. 12. Sect. 9, 10, 11.

(n) As our Proxy.] Servius upon that Passage of the ixth Æneid. — Hospitio

of some general Qualification; it may also happen, where the *Commission* is to act in general, that the Person so *Commission'd* may lay us under an Obligation, though he acts contrary to our Will signified to him in his *private* Instructions; for here be two distinct *Acts* of the *Will*, the one whereby we oblige our selves to *ratifie* whatever our *Proxy* shall do in such a Business, the other, whereby we oblige our said *Proxy*, that he shall not act beyond some private Instructions that are known to *Him* and no Body else. This is observed (o) in Relation to those Things which *Embassadors* promise for their *Principals*, who by virtue of their publick *Powers* and *Credentials*, do sometimes exceed their Secret Orders.

XIII. How far Super-cargos and Factors, are obliged by the Law of Nature; where also is observed the Error of the Roman Law.

XIII. Hence we may understand, that *Actions* brought against *Super-Cargos* and *Factors*, which indeed are not so much *Actions*, as *Qualities* of *Actions*, are founded upon the very *Law of Nature*; and here too, I cannot but observe, that it is very ill done of the *Roman Laws*, to make every Man of the *Ship* become Responsible for whatever the *Master* does. For this is neither agreeable to *Natural Equity*, which is satisfied, if every one be bound for what *concerns* himself, nor it is *advantageous* to the *State*, for Men would be discouraged from engaging in *Trade* and *Sea Affairs*, if they were afraid of being, as it were, *infinitely* Accountable

— *Hospitio cum jungeret Absens.*

And absent join'd in Hospital Ties.

Dryd.

says, this was done by People sent by each Party for that purpose. See what's above at Ch. vi. §. 2.

(o) In Relation to those Things, which *Embassadors* promise for their *Principals*, who by virtue of their publick *Powers* and *Credentials*, do sometimes exceed their secret Orders] See an Instance of this in *Mariana*, xxvii. 18. Another in *Guicciardin*, Tom. 1.

countable for what the *Master* of the *Vessel* did. Infomuch that in *Holland*, where *Merchandize* has of late mightily flourished, this *Roman Law*, neither formerly, now now, is of any Force. Nay, on the contrary it is order'd, that the whole *Company* in general shall be answerable no farther, than for the *Value* of the *Ship*, and of the *Goods* that are in it.

XIV. But that a *Promise* may transfer a Right, (p) the *Acceptance* of the *Person* to whom it is made is no less required here, than in the Case of transferring a *Property*; yet so, that here also a Precedent *Request* shall be judged an *Acceptance*. Neither does that which the *Civil Law* has introduced concerning *Promises* made to the publick hinder this, which Reason however has so far prevailed with some, that they presume that the sole Act of the *Promiser* is by the *Law of Nature* sufficient. For the *Roman Law* does not say, that the *Force* of the *Promise* is compleat before it be accepted; but only forbids to revoke it, (q) that it may be always accepted; which *Effect* is not from the *Law of Nature*, but merely from the *Civil Law*. Not much unlike to which is what the *Law of Nations* has introduced in favour of *Infants* and *Madmen*: For in such as these the *Law* supplies the *Intention*, both of possessing Things which require such a particular *Tenure*, and of accepting what is promised.

XIV. A Promise must be accepted before it can be binding.

XV. It

(p) The *Acceptance* of the *Person* to whom it is made is no less required here, than in the Case of transferring a *Property*.] *Tertullian*, speaking like a Man who was perfectly acquainted with the *Laws*, says in his Book *de Fecuniis*: A *Vow*, when God has accepted it, is for the future as obliging as a *Law*.

(q) That it may be always accepted.] See such another *Law* of the *Westgoths*, l. v. tit. 2. c. 6.

XV. Whether this Acceptance should be signified to the Persons promising, explained by a Distinction.

XV. It is also sometimes *disputed*, whether (to make a Promise valid) it be enough that it is only *accepted*, or that the *Acceptance* also be signified to the *Promiser* before it can obtain its full effect; and it is certain, that either way the *Promise* may be *obliging*. As thus, *this Engagement shall stand good, if it be accepted*; or thus, *this shall stand good, if I understand that it is accepted*. In those *Promises* indeed which imply a *mutual Obligation*, the *Engagement* is to be understood in the *latter Sense*; but in *Promises* of mere *Generosity* it is best to suppose, that it was meant in the *former Sense*, unless it evidently appears to the contrary.

XVI. Whether a Promise may be revoked, the Person to whom it was given, dying before he had accepted of it.

XVI. Hence it follows, that a *Promise* made before *Acceptance* (for till then no *Right* is transferred) may be revoked without *Injustice*, nay, and without the Imputation of *Fickleness* too, if it were really so intended, when first made, that it should not *begin* to be of Force till the time of its being *accepted*. It may be also *revoked*, if the Person to whom the *Promise* was given *die* before *Acceptance*; because it seems to be referred to his own *Choice*, and not to that of his *Heirs*. For it is one thing to be willing to give away a *Right* to such a Man, and by him to be transferred to his *Heirs*, and (r) another Thing, to be willing to give it directly to his *Heirs* themselves; for it is very Material, to consider on *whom* we confer a Kindness. And this is what *Neratius* answer'd, that for his part he could not believe, that the *Prince* would have granted that to one who was *Dead*, which he had granted to him, supposing him *alive*.

XVII. 1. A

(r) Another Thing, to be willing to give it directly to his *Heirs* themselves.] And therefore to avoid all Dispute, 'tis usually said: To him and his *Heirs*. *Servius* upon the 19th *Æneid*. See too the *Wisigothic Law*, l. v. tit. 2. c. 6.

XVII. 1. A *Promise* also may be *revoked* upon the *Death* of the Person, who was employ'd to signify the Intention of the *Promiser*, because the *Obligation* lay in his Words. But it is otherwise, if the Person sent upon this Errand were a common *Messenger* or *Carrier*, who is not the *Instrument* of the *Obligation* himself, but only the *Bearer* of the *Deed*, that contain'd the *Obligation*. And therefore the *Letters* which declare such a Consent may be carried by any *Body*. We must also distinguish between him who is *deputed* to signify the *Promise* we make, and one who is *authorized* by us to make that *Promise* himself. In the former case a *Revocation* shall be of full Force, tho' it be not discover'd to him who carries the *Promise*. But in the other the *Revocation* will be invalid; because the *obliging* Power depended upon the *Will* of the Person *sent* to make it, which if he made before he knew of the *Revocation*, the *Grant* shall be *valid* to all Intents and Purposes. So also in the former Case, (f) though the *Donor* die, the *Gift* may be *accepted*, as being on one part *compleated*, tho' subject to a *Revocation*, as does more plainly appear in the Affair of *Legacies*; in the other Case it cannot, because it is not done, but only ordered to be done.

XVII.
Whether it
may be re-
voked, upon
the Death
of the Per-
son employ'd
to signify it,
explain'd by
some Distin-
ctions.

2. But in a dubious Case, it is to be presumed that it was the *Will* and *Intention* of the Person, who gave such *Orders*, that his *Orders* should have been executed, unless some great *Change*, such as the *Death* of the Person so ordering, should happen to intervene. But however, there may be some *Conjectures* which may incline us to believe otherwise, and these we ought without any Dif-

VOL. II.

S

ficulty

(f) Tho' the Donor die, the Gift may be accepted. See the Book de Tenuris Anglia.

difficulty to admit, to the end that what was ordered to be given upon any Religious Account may stand good. And thus may that *Question*, which was formerly much canvas'd, be answered, whether an *Action* upon that *Order* lies against the *Heir*. About which particular Case the Author of l. 11. to *Herennius* relates, that *Drusus* the *Praetor* decreed one Thing, and *Sextus Julius* another.

XVIII.
Whether a
Promise ac-
cepted by
Proxy, may
be Revers'd,
explain'd
by some De-
stinctions.

XVIII. 1. Disputes also frequently arise concerning the *accepting* of a Thing for another. In which Cases we must *distinguish* between a *Promise* made to me of something to be given to another, and a *Promise* made in the *Name* of him to whom the Thing is to be given. If the *Promise* be made to my self, without considering whether I have any *Interest* in it, a Consideration that the *Roman Law* has introduced, by *accepting* it I look upon it, that I am naturally invested with the *Power* of *transferring* that Right to another, if he also will *accept* of it; so that the *Promiser* has no *Right* in the mean time to *revoke* it; but I the Person who *receiv'd* the *Promise*, may if I please *remit* it. For this Sense is not against the *Law of Nature*, and also very agreeable to the Words of such a *Promise*; nor is it no manner of concern to me, that another obtains a Favour by my Means.

2. But if the *Promise* be made in his Name, to whom the Thing is to be given; we must then distinguish whether the *Acceptor* has a particular *Commission* to accept it, or one so general, as may be judged sufficient to include it; or whether he has no such *Commission* at all. Where such a *Commission* has been given before, there is no Occasion to enquire any farther, whether the Person be a *Freeman* or no, which the *Roman Laws* insist upon, but the *Promise* is fully compleat by that *Acceptance*. Because a *Consent* may be conveyed, and signified

signified by any *Third Person*, whose *Will* is reputed *mine*, if impowered by me, and he readily takes it upon him. But if there be no such *Commission*, and yet this *Third Person*, to whom the *Promise* is not directly made, accepts it at the request of the *Promiser*; then has the *Promiser* no Power to *revoke* the *Promise*, till he whom it concerns shall either approve or reject it; yet so, that in the mean time, he who has *accepted* of the *Promise* has no Power to *remit* it, because he was not employ'd to take any Right upon himself, but only to engage the *Promiser's* Honour, in the Performance of the intended *Favour*; so that if the *Promiser* should pretend to *revoke* it, he may be said to break his *Word*, but not invade any Man's *Property*.

XIX. From what has been said, we may easily understand, what we are to judge of any *Condition* annexed to a *Promise*. For that may be done, as long as the *Promise* is not *completed* by *Acceptance*, nor the *Promiser's Word* and *Honour* given, that it shall be *irrevocable*. But a *Condition* annex'd to a *Promise* for the Advantage of a *Third Person* may be *revoked*, as long as it is not yet *accepted* by that *Third Person*; though there are some, who in this, as well as in other *Questions*, are of another Opinion. But to one that thoroughly considers the Matter, the *Natural Equity* will so clearly appear, that there will be no Occasion for many *Proofs*.

XX. It is, also, sometimes disputed how a *Promise* occasioned by an *Error* or *Mistake* in the *Promiser*, may recover its Force, if the Truth of the Matter being known, the *Promiser* be willing to stand to his *Promise*. The same Question may also be put concerning *Promises*, which are obstructed and disapprov'd of by the *Civil Law*, as being occasioned by *Fear*, or any other *Cause* or *Motive*,

XIX. *Whether in what time some Conditions may be tack'd to a Promise.*

XX. *An Invalid Promise may become obliging.*

when that *Cause* or *Motive* shall afterwards cease. For to *confirm* these, some think, that nothing is required but the *Internal Act* or *Intention* of the *Mind*, which being join'd with the former *External Act* or open *Declaration*, they judge sufficient to create an *Obligation*. Others disliking this, because they cannot allow, that any *Outward Act* should be a sufficient Sign of an *Internal Act* coming after it, require a new Promise made by *Word of Mouth*, and a new *Acceptance*. But the middle Opinion is nearest the *Truth*, which requires some *Outward Act*, but not a *Verbal* one, since the *retaining* of the Thing promised by the *Person* to whom it was *promised*, and the *relinquishing* of it by the *Promiser*, or some other such *Action*, are enough to testify the mutual *Consent* of both *Parties*.

XXI. Promises made without any Motive are not therefore naturally void.

XXII. How far he who Promises for what another is to do, stands himself naturally oblig'd.

XXI. This also must not be omitted, lest we confound the *Civil Law* with the *Law of Nature*, that *Promises* as well as *Gifts* may be valid by the *Law of Nature*, though there be no particular *Motive* for so doing express'd.

XXII. Nor is any Man by his *Promise*, that he makes for what another Body is to do, obliged to make up All that's between 'em, provided he omits nothing that on his Part he can possibly do, in order to get that other Man to perform his; unless the Words of the *Promise*, or *Nature* of the *Business* carry with 'em any *stricter Obligation*. He was discharged from his *Engagement*, (says *Livy*) (t) since it was no Fault of his, that it was not perform'd.

C H A P.

(t) Since it was no Fault of his, that it was not perform'd.] Compare here what's below, B. iii. Ch. xx. §. 30.

CHAP. XII.

Of Contracts.

I. **A**mong such Human Acts as turn to other Mens Advantage, some are single and uncompounded, others are mixt and compounded.

I. Such Human Acts as are Advantageous to others are divided, first into simple and mix'd.

II. Simple Acts are divided into such as are merely gratuitous, or that imply a mutual Obligation.

II. (a) Those that are single, are either Gratuitous and done for Nothing, or Permutatory and by way of Exchange: Such as are Gratuitous, are either merely so, or with a sort of mutual Obligation. Those that are merely Gratuitous, are either done out of Hand, or remain in suspense for some time. We have no occasion to speak of a good turn that's done out of hand, because, tho' it produces an Advantage, it does not create any effect of Right, no more than of a Deed of Gift, whereby a Property is transferr'd; for of this we discours'd above, where we treated of the several ways of gaining a Property. Such Acts as remain in suspense for some time, are the Promises of Giving and Receiving, which we were just now talking of. Gratuitous Acts, with a sort of mutual Obligation, are those which dispose of some thing or other without an Alienation of it; or of some Action or other, yet so as that some Effect of it does still remain; such as is, in respect of a Thing, the leave to use it, which is call'd Lending: And as to what regards Actions, the doing of some Service that's attended with an Expence, or which we have oblig'd our selves to do, and this last is term'd a Command,

S 3

(a) Those that are single are either Gratuitous and done for nothing, or Permutatory, and by way of Exchange.] Aristotle comprehends all those under the Title *Storgas*, of giving, these, of exchanging, of buying.

mand, one kind of which is a *Trust* or *Charge*, where we take *Pains* to guard and keep what is committed to our *Care*. And of the same *Nature* with such *Actions* as these are the *Promises* of such *Actions*, unless it be, as we said before, that they remain in *suspence* for *some time*; which *Circumstance* we would also have to be understood of the *Actions* we are now going to explain.

III. And into such as are Permutatory, or by way of Exchange; and these are either such as adjust what each has to give or so do.

III. 1. Acts *Permutatory*, or by way of *Exchange*, either regulate and adjust the *Share*, or make Things common: The *Roman Lawyers* rightly distinguish those Acts, which regulate *Shares* into these, *Do ut des, facio ut facias, facio ut des*: I give you this, that you may give me that; I do this for you, that you may do that for me; I do this for you, that you may give me that. Upon which Subject we may see *Paulus the Lawyer*, in *l. Naturalis D. Prescript. Verb.*

2. But the *Romans* exempt from this *Division* some certain *Contracts*, which they call *Nominate*, not so much because they have a peculiar *Name*, (for so has also the *Contract* upon *Exchange*, which however they exclude from their *Nominate Contracts*) but because on the account of their more frequent use, they (b) had receiv'd such a *Force*, and were of such a *Nature*, that tho' nothing at all should be particularly said of 'em, one might by their very *Name* sufficiently understand 'em: Upon which account too there were assign'd to them certain set *Forms* of *Actions*. Whereas in others less frequent, there was no more inserted than what was spoken, and of consequence, no common and customary *Form*, but one suited to that *Occasion*; which was therefore call'd an *Action* in prescribed

(b) Had receiv'd such a Force, and were of such a Nature.] See *Vasq. l. contrav. c. 10. at the End.*

prescribed Terms. And by this frequent use of *Nominate Contracts*, if some requisite *Clauses* were inserted, as in case of a *Sale*, for instance, (c) if the *Price* were agreed on, even tho' the matter was yet *entire*, that is, *before* any thing was performed on either side, there was an absolute necessity of *standing* to the *Bargain*. Whereas in *Contracts* not so frequent, whilst the *Thing* was *entire*, they had the *Liberty* of *Repealing*, that is, they might go off from their *Agreement*, without any *Penalty* for so doing; because the *Civil Law* took away from such *Contracts* the *Power* of *Compulsion*, and left them wholly dependent on the *Word* and *Honour* of the *Parties* concern'd.

3. But the *Law of Nature* knows nothing of any such *Distinctions*; nor are those *Contracts*, which they call *Innominate*, either less *Natural*, or less *Ancient*; nay *Exchange*, which they reckon among the *Innominate*, is both (d) more *simple*,

S 4

(c) *If the Price were agreed on.* Among the *Hebrews* no *Sale* was look'd upon to be compleat, unless there was either a *real* or an *imaginary Delivery* of the thing purchas'd.

(d) *More simple and more ancient.* This is plain from those *Verfes* of *Homer* cited l. 1. D. *de contrahenda emptione*. *Tacitus* talking of the *Germans*, *The more Inland People follow the good old Custom of bartering one Commodity for another.* *Servius* at the 4th *Eclogue* upon the *Passage*,

Mutabit Merces

— For *Foreign Ware*.

Dryd.

assigns this Reason for the Expression; because the *Ancients* used to chop one *Ware* for another. And upon that of the 3d *Georg.* where he construes *Vellera mutentur*, the *Fleeces* are chang'd, *Ingenii Pretio comparentur*, are sold at a great Rate. For formerly ev'ry *Commodity* was purchas'd by *Exchange*; and this *Cajus* has confirm'd by an Example in *Homer*. *Pliny*, B. 23. 2. *How much happier was the Age, when one thing was exchange'd for another, as Homer thought*

and more ancient, than *buying*. And *Eustathius* upon the 10th of the *Iliads*, speaking of a publick *Trial of Skill*, to which there was appointed a *Prize*, what *Homer* terms ἀρναδς, to *purchase*, he renders ἀνταλλαλαττεας, to *exchange*, adding συναλλαγμα γάρ τι κ' τα τοιαυτα, for *this and such like are a kind of Bargain*. The Agreement is, *I do this, that you may give me that, my Work for your Goods*. And therefore we for our parts, following *Nature*, shall, without any *Regard* to the *Distinction* of *Nominate* and *Innominate*, reduce all *Contracts* that are made by way of *Exchange*, or for the *Regulation* of *Shares*, to the *three* sorts before-mention'd.

4. And accordingly we say, that in cases where I give *this* that you may give *that*, I either *immediately* and upon the *Spot* give one *Thing* for another, as in that way of *Bartering* which is an *Exchange* properly so call'd, and the most ancient Method, no doubt of it, of *Trading* and *Commerce*; or I give (e) *Money* for *Money*; this the *Greeks* call νόλλυβς, *Coin* for *Coin*; our *Merchants* now-a-days *Change* or *Banking*; or give *Goods* for *Money*, as in *Buying* and *Selling*; or the *use* of my *Goods* for some other *Goods*; or the *use* of my *Goods* for the *use* of *yours*; or the *use* of my *Goods* for your

thought was the Practice in the Trojan Days. And in B. 6. ch. 22. speaking of the *Seres* what Goods they have to dispose of, they lay down on t'other side the River near what they have occasion to purchase, to be taken away by these, if they are satisfy'd with the Exchange. *Mela*, of the same Folks. The *Seres* are between, a People of strictest Honesty in Dealing, which they manage, tho' absent, by leaving their Commodities behind 'em. And *Ammianus* of 'em too. l. 23. When Strangers are come over the River to chaffer, for Silks or any other Goods, the Prices of the things offer'd to Sale are concluded on by the Eye only, without any Talk at all about 'em. *Mela*, of the *Tartars*, They Trade by giving one Ware for another. See *Busbequius*, of the Inhabitants of *Mengrelia*, Epist. Exot. 3. and *Olaus Magnus* of the *Lapländers*, l. 4. c. 5.

(e) *Money for Money*.] See *Procopius* upon this Subject in his secret History. In *Italy* they brought *Species* formerly from *Sclavonia* instead of *Goods*. *Pliny*, B. 33. c. 3.

your *Mony*, which last is term'd *Letting* and *Hiring*. By *Use* we mean here not only the bare *Use* of a *Thing*, but also all the *Profits* and *Advantages* that accompany it, whether it be made over only for a *Time*, or to one *Person* and no more, or to *him* and his *Heirs*, or in any other precise and particular manner, as that among the *Hebrews*, which lasted 'till the *Jubilee-Year*: But if I *give*, or part with a thing, that so at the Expiration of some certain time I may have as much in *Value*, and the very same in kind again, 'tis a *Loan*; and this takes place where *Things* consist of *Weight*, *Number*, and *Measure*, whether *Mony* or any thing else.

5. But the Bargain of my doing this, for your doing that, or *Work* for *Work* may be as various as *Human Actions*, themselves are. But the Agreement of my doing this, for your giving me that, is either for *Mony*; and this too in cases of daily Labour and Service, is call'd *Letting* and *Hiring*; but where one takes upon one to make *Amends* for any *Damage* that you may receive, or to secure your *Effects* against *Hazard* and *Casualties*, 'tis commonly styl'd *Insurance*, a *Contract* scarce known formerly, but now as much practis'd as any whatever; or else I am to do so and so, in consideration that you give me some thing of yours, or the *Use* of some thing of yours.

IV. But Acts *Communicatory*, or such as introduce a common Title, make either *Actions* or *Things* common; as on the one side *Things*, and on the other side *Actions* for a common Advantage, and all this comes under the Name of *Society*; under which also is comprehended an *Association* for *War*, as when several private Vessels agree together to Man themselves out at their own Charge against *Pirates* or any other *Invaders*, which is usually called

IV. Or such as put things upon a common foot.

led an *Admiralty*, and by the Greeks *σύνπλοια*, or *σύνπλοια*, a *Joint Fleet*.

V. *Acts*
mixt are ei-
ther so essen-
tially and of
themselves;

V. But *mixt* or *compounded Acts* are so either of *themselves*, or by the *Accession* of some other *Contract*. Thus, if I shall knowingly give more for a thing than it is *worth*, or than I can *buy* it for of another, it is (a *mixt Act*) partly a *Gift*, partly a *Purchase*. If I agree with a *Goldsmith*, for so much *Mony*, to make me so many *Rings* of his *own Gold*, it is partly a *Buying*, partly a *Hiring*. So also it happens in *Societies*, that one side is to contribute both *Actions* and *Mony*, and the other only *Mony*. So likewise the *Grant* of *Land* to be held in *Fee*, is a *Favour*, and a piece of *Generosity*, but the obliging the Person to *Military Service* for the *Protection* I give him, is *facio ut facias*, *I do this for you, that you may do that for me*. But if something be to be paid yearly for it besides, by way of *Acknowledgment*, it is then so far a *Quit-Rent*. So *Mony* sent to Sea by way of *Venture*, is something compounded of the *Contract* of a *Loan*, and of an *Insurance*.

VI. Or by
the Accessi-
on of some
new Circum-
stance.

VI. An *Act* becomes *mix'd* by the *Accession* of some other, in the manner, as we see it in the cases of a *Bail* or a *Pawn*. For a *Bail*, if you regard what passes between the *Person* putting in the *Bail*, and the *Principal Debtor*, is generally a sort of *Command* or *Order*: But if you respect *Matters* as they stand between the *Creditor* and the *Bail*, who gets nothing at all by it, it seems an *Act* purely *free* and *generous*; but because it is what is *added* to such *Contracts* as are *chargeable*, it is therefore it self reputed so. Thus too a *Pawn* seems of it self to be a *Free Act*, because it *allows* the thing to be detained, but this also derives its *Nature* from the *Contract* whose *Security* it provides for.

VII. But

VII. Now all Acts, *Advantageous* to others, except those which are of meer *Generosity*, are called *Contracts*.

VII. Which of the Acts are called Contracts.

VIII. In all *Contracts* Nature demands an *Equality*; insomuch, that the *aggrieved* Person has an *Action* against the other for *over-reaching* him. This *Equality* consists partly in the *Acts* and *Circumstances*, and partly in the *Subject* it self of the *Contract*; and this *Equality*, or *Dealing* upon the *Square*, must be observed as well in those *Circumstances* that are *previous* to the *Bargain*, as those that are *Principal* and *Essential* in it.

VIII. There is an Equality required in Contracts and first in the Circumstances that are previous to 'em.

IX. 1. One of these *previous* Circumstances is, that he we deal with ought to discover to us (f) all the *Faults* he knows of in the thing we are dealing for; and this is not only what's *injoin'd* by the *Civil Law*, but is also agreeable to the *Nature* of the *Act*, there being a nearer *Society* and *Engagement* between Persons *Contracting*, than what is common to all *Mankind*. And thus may we answer, what *Diogenes*, the *Babylonian*, said upon this Topic, that all things which are not declared, are not therefore to be thought *dissembled*. Nor am I under any *Necessity* of telling what may be for your *Advantage* to hear, as in the case of *Heavenly* things; for (g) the *Nature* of a *Contract* being contriv'd for

IX. One is to know every thing that relates to what he is dealing about.

(f) All the Faults he knows of.] See the Scholiast upon that Passage of *Horace*,

Mentem nisi, &c.

Now he that sold him, might have safely sworn
He's sound both *Mind* and *Limb* as e'er was born;
But cheated, if he swore him sound in *Soul*.

Creech.

(g) The *Nature* of a *Contract* being contriv'd for Profit and Service, requires something of exactness in it.] *Valerius Maximus*, l. 8. c. 11.

An

for Profit and Service, requires something more of exactness in it. It was well observ'd of St. Ambrose, In all Contracts, whatever Faults are in the things expos'd to Sale, they ought to be discover'd to the Buyer, which if the Seller does not do, tho' the Right of the thing be transferred to the Buyer, the Contract ought to be void, by reason of the Fraud. And in Lactantius, If a Man should pretend to sell a Servant, that is a Fugitive, or a House infected with the Plague, and does not discover it to the Purchaser, regarding only his own Profit, he is not an Ingenious Man, as Carneades would have him, but a Knave and a Rascal.

2. But it is not so with Circumstances that do not directly concern the thing contracted for. As if a Man should know that there are several Ships in the Road laden with Corn, he is not oblig'd to tell you so; but however, to discover such a thing is kind and commendable, and in some Cases not to be omitted without breach of Charity; yet I will not say it is unjust, that is, that it violates his Right with whom he is Dealing; and therefore what the same Diogenes very pertinently said, as Tully relates it, is as applicable here, *I have brought my Commodity, I have expos'd it to Sale, I sell no dearer than other Folks do: Nay, perhaps cheaper, because there is a greater Quantity of it, whom do I injure then?* Wherefore that of Cicero is not in general to be allowed, that to conceal or dissemble a thing is, when you would have those whom it concerns to be acquainted with it, to be ignorant of what you

An honest Seller must neither augment the Buyer's hopes of Advantage, nor disguise and conceal from him the Knowledge of the Faults and Inconveniencies that accompany the Purchase. The Author is speaking there of an Hcuse which the *Augurs* had ordered to be pull'd down, which Circumstance the Person who was to dispose of it had ne'er acquainted the Purchaser with

you know of the matter, meerly for the sake of your own private *Interest*. For then only it is *unjust*, when it immediately concerns the Thing that is to be *contracted* for, as if a *House* be infected with the *Plague*, or ordered by the *Magistrates* to be *pulled down*. Several Instances of which you may see there.

3. But it signifies nothing to speak of those *Faults*, which are *known* to your Dealer, as the *Condition* of the *House* which *M. Marius Gracitianus* sold to *C. Sergius Orata*, which he had bought of him before. For (*b*) an equal Knowledge on both sides puts both Parties upon an equal Foot. Thus *Horace*,

*Ille feret pretium pœne securus, opinor
Prudens emisti vitiosum.*

*The Dealing's Fair, and he may take your Gold,
And ne'er be thought a Cheat for what he sold:
You bought a Faulty Rogue, he told you so.*

Creech.

And this is a Remark of *Plato's* too in his *11 de Legibus*.

X. Nor should there be only an *Equality* of Knowledge between the Persons *Bargaining*, but also a Mutual Freedom of *Will*; not indeed that the Seller is oblig'd to remove any *unjust* Fear that the Buyer may have been prepossessed with, for that is a Thing *extrinsic* to the Contract; but that no Man should be frighten'd into a *Bargain*; and if he be, that that *Fright* should first be over. In respect to this the *Lacedemonians* made void the Purchase of some

X One is
to be left
entirely to
Freedom,
and to have
no Force put
upon his
Will.

(*b*) An equal Knowledge on both sides puts both Parties on an equal Foot.] *Thenderic's Edict*, c. 141.

some Land which the *Eleans* had by Fear extorted from the *Owners*, γρόβας μὲν δὲν δυνάστεσσιν ἢ Βία ἀπαλαύσας &c. looking upon it as great an Injustice to take the Goods of weaker People upon the pretence of Purchase, as by meer Force; which are the very Words of *Xenophon*. But what Exceptions the Law of Nature allows in these Cases, shall be shewed in its proper place.

XI. There's
secondly, an
Equality re-
quired in
the Bargain
it self, if it
be Permu-
tatory, or
by way of
Exchange.

XI. 1. The Equality requir'd in the *Principal* Circumstance of a Bargain is, that no more be exacted than what is just and fit, which can scarce ever be observ'd in Agreements of *Bounty* and *Beneficence*; for if I agree to give somewhat over and above by way of *Reward*, either for what you have lent me, or for your Diligence in executing my Orders, or for your Care in looking after what I entrusted you with, I do no wrong, I only mix the Contract, by making it partly *Permutatory*, and partly *Gratuitous*. But in all *Permutatory* Contracts this Equality is to be punctually observed; nor must any one pretend, that what is promised more than is due by either Party, is to be looked on as a *Present*: For this is seldom the Design of *Contracters*; nor is it to be presumed, unless it appear so. For whatsoever Men promise or give, they are supposed to do it in proportion to what they are to receive, and as something due only upon the *Square*.

2. Thus *St. Chrysostom*, ὅταν γὰρ ἐν τοῖς &c. whenever in our Contracts, our Purchases, or our Payments, we perfectly Quarrel, and use all our Might and Means to beat down the Price, what is this but a sort of *Robbery*? The Writer of *Isidore's* Life in *Photius* tells us of one *Hermias*, who having bought any thing too cheap, would of his own accord add as much as it wanted of its true Value, holding it a piece of Injustice to do otherwise; but such an Injustice as few were acquainted with. And in this

Sense

Sense do the *Hebrews* interpret the *Law* in (i) *Lev. xxv. 14. and 17.*

XII. 1. There now remains the *Equality* requir'd in the *Thing* it self that's *Bargain'd for*, consisting in this, that tho' nothing was *concealed* that ought to have been *discover'd*, nor any more *exacted* than what was thought to be really *due*, yet if there be found any *Unfairness* in the *Thing* it self, tho' neither Party was to blame for it, as, suppose, there was some unknown Defect, or there was a mistake in the Value, yet in this Case must the *Inequality* be made up, and he who has too much must give it to him who has too little, because in the Contract 'it either was, or ought to have been propos'd that both sides should be dealt with *alike* and upon the *Square*.

XII. And thirdly in the thing we are bargaining for, this explain'd.

2. The *Roman Law* however does not injoin this in every *Inequality*; it does not concern it self with very *small* things, on the contrary it directs us to put a *stop* to a multitude of vexatious *Suits*; but only where the *Damage* is *considerable*, as where it exceeds *half* of the just Value. For the *Laws*, says *Cicero*, take one way to root out *Frauds*, and *Philosophers* another; the *former* meddling no farther with 'em than as they break out into *open Acts*, and may, as it were, be laid hold on by the *Hands* of *Justice*; the *latter* endeavouring to hinder their *breaking out*, and to prevent 'em by *Precepts* of *Wisdom* and *Reason*. And therefore they who are not *subject* to the *Civil Laws*, but are *above* 'em, ought to follow that which *Right Reason* informs 'em to be *Good* and *Equitable*, and so too ought those who are *subject* to the *Laws*, when the *Affair* that's transacting is what relates to *Justice* and *Honesty*, provided that the *Laws* are silent in the Case, and
neither

(i) *Lev. xxv. 14 and 17.* See *Moses de Kotzi Sz. Prat Juben.*

neither grant nor take away our Right, but only for some certain Considerations deny their Aid and Countenance to it.

XIII. What Equality is to be observed in Acts of Beneficence, in such as are altogether so, and in such as are only so in part.

XIII. I. But we must observe, that some Equality ought to be regarded even in Agreements of Bounty and Beneficence, not indeed entirely such a one as is expected in Contracts of Exchange, but with respect to the Nature of the matter in hand, that a Man, for Instance, be not himself damaged by the Kindness he does. And therefore he who is employ'd and commission'd by another, should be indemnify'd from all Charges and Losses which may attend the execution of that Commission, and so the Borrower is obliged to make good any thing that is lost, because he stands bound to the Owner not only for the thing it self, that is by vertue of his Property in it; for so any one who had had it would be obliged, but also by way of Gratitude for his Favour in lending him it, (k) unless it appear that the Thing so lent would have perish'd, had even the Owner had it in his Possession: For in this Case he loses nothing by the Loan. On the contrary, he with whom any thing is deposited, receives nothing but a bare Trust, and therefore if the thing be gone he shall not be Responsible for it; nether in respect of the thing, because it is not in being, nor is he the richer for it; nor in respect of his Acceptance, because in his Acceptance he received no Kindness, but did one. In things pawned, indeed, as well as in such as are let out, a middle way is to be observed, that the Receiver may not be answerable for every Misfortune as he who borrows a thing is, and yet a much

(k) Unless it appear that the thing so lent would have perished, had even the Owner had it in his own Possession. The Wife's Law 1. c. 1. de j. c. 1. 2. 3.

much greater care is required of him to preserve it, than of him with whom a thing is deposited, because, tho' the Taking in a Pledge be Free and Gratuitous, yet is it generally the Consequence and Result of a chargeable Contract.

2. All which agree with the *Roman Laws*, but were originally derived from *Natural Equity*, and therefore are found in other Nations also. And among the rest, in the Hebrew, *Moses Maimonides* Doctor. Dubitant. l. iii. (l) c. 33. To this had *Seneca* respect, when he said, *Some owe Fidelity, others Protection*. And by this Rule we may easily form our Judgments of other Contracts. But now having (as far as was Necessary to our purpose) fully discoursed of Contracts in general, we shall briefly run through some more particular Inquiries about 'em.

XIV. 1. The most Natural Measure of the Value of any Thing, is the *Want* of it, as *Aristotle* rightly observes, and this is what the best civiliz'd People are altogether guided by; yet this is not the only Measure. For the *Will* of Men, which governs every Thing, covets more Things than are immediately Necessary. (m) *Luxury*, says *Pliny*, gave the Price to Pearls; and *Cicero* in his Oration

XIV. How things are to be valued in selling; and for what Reasons the Price may be raised, or lowered.

VOL. II.

T

against

(l) C. 43.] This agrees with a Passage in *Exodus*, ch. xxii. 6, 10, 11, 12, 13. *Moses de Kotzi*, lxxxviii and lxxxix. *Præcep. Juben.*

(m) *Luxury* says *Pliny*, gave the Price to Pearls.] And the same Author in his xxxviii Book treating of Jewels: 'Tis Folks Pride and Curiosity, and especially the Extravagance of Princes, that determines the Value of these Things. And in his xxxiiid Book. The Indians set as great a Price on our Coral, as we do on their Pearls; for these Things depend altogether on People's Humours. And *St. Austin* de Civitat. Dei. l. xi. c. 16. And pray, where's the Strangeness of all this, when you find that so unaccountable are these Men's Notions, though they are in their own Natures of so much Excellence and Dignity that they shall frequently give more for an Horse than a Slave; and for

against Verres, *In Preparation to our Curia* for such sort of Things is our Value of 'em. And so on the contrary it happens, that Things which are Indispensibly Necessary, are on the account of their Plenty abundantly Cheaper; which Seneca illustrates by several Instances, *de Benefic.* l. vi. n. 15, where he also subjoins this; the Price of every Thing is according to the Markets; when you have commended 'em ever so much, they are worth no more than they can be sold for. And Paulus the Lawyer: The Prices of Things do not depend on this or that Man's Humour or Interest, but (n) on the common Vogue, that is, as he explains it elsewhere, on the Value that all the World puts on 'em. Hence is it, that a Thing is really worth so much, as is usual and customary to be offered and given for it, which can scarce be so settled as not to admit a Demand of more or less, except it be where the Law has fix'd a certain Rate, *ex vii. n.* precisely, and to a Point, as Aristotle expresses it.

3. And now in that Common and Current Price of Things, (o) we usually have a Regard to the Pains

for a Jewel than a Servant? Thus, where there's such a Liberty left us of making our own Judgment of Things, the Reason of him, who considers 'em only as they're Necessary, and as what he has a Real Occasion for, does vastly differ from the Sentiment of him, who views 'em as they indulge his Fancy, or administer to his Pleasure; here nothing more is regarded than what Value and Degree of Esteem the World, or himself puts upon 'em without any Respect of their Usefulness; there Usefulness enters the Account, and 'tis that alone which recommends 'em to his Desires; the one looks out for something of True Worth, and which appears so to his unprejudic'd Mind, the other for some soft and agreeable Amusement, that gratifies the Senses of his Body.

(n) On the Common Vogue. Plin. l. xviii. c. 21. An honest prudent Man, who has a Family to maintain, makes use of the Provisions that every Year furnishes him with.

(o) We usually have a Regard to the Pains and Expences the Merchants or Traders have been at. Nor does St. Austin disapprove of this

Pains and Expences the Merchants or Traders have been at, and it often rises and falls all on a sudden, according as there are more or fewer either *Chapmen, Money, or Commodities*. Besides there may possibly some such *Circumstances* intervene, as may very justly raise or lessen the ordinary *Market-Price*; as for Instance, I may have occasion for the Goods my self, and 'twill be an Inconvenience to me to part with 'em, or I may have an *Advantage* that I should otherwise make, or I may have a particular fancy for 'em, or I may out of *Kindness* and *Complaisance* to some Body else buy or sell what for my own Part I should never purchase or dispose of; all which Circumstances the Person we deal with ought to be acquainted with. And we may also have Regard to the *Loss* or *Gain* that arises from the *Delay* or the *Promptness* of Payment.

XV. 1. As to buying and selling, we must observe, that the Bargain and Sale is good, from the very Moment of the Contract; and though the Thing be not actually delivered, yet may the Property be transferred, and this is the plainest way of Dealing; for, as (p) *Seneca* says, *selling is the alienating of a thing that belongs to us, and the translating of it, and the Right we have in it, to some other; for it is so in an Exchange*. But if it be agreed, that the Property shall not pass immediately, then the Seller shall be obliged to transfer his Property at such a Time, and in the mean while both the Profits and Hazards shall be the Seller's. And there-

XV. When a Sale is compleat by the Law of Nature, and when the Property of the Thing is transferred.

T 2

this upon Pl. lxx. But says the Person you are dealing with; I bring my Goods a great way, I only desire a living Price for my Trouble; and the Labourer is surely worthy of his Hire. Friend we are not talking about your Trade and Business, but about your Lying and Perjury in it.

(p) *Seneca*.] De Benefic. 7. 10.

therefore that buying and selling consist in the immediate empowering us to recover by Law what's purchas'd, and that the Buyer must run all Risques, and that the Profits shall belong to him before the Property be actually transferr'd, are Devices of the Civil Law, which is not in all Places minded. Nay, that, on the contrary, most Law-Makers have thought fit to enact, that till the delivery of 'em the Seller shall have the Advantage, and stand to the Hazard of the Goods, Theophrastus has remark'd on a Passage (q) in Stobæus, where you may also find many other Decrees of the Solemnity of Selling, of giving Earnest, of Retracting, very different from the Roman Laws; And Dion Pruseensis too has observed, that among the Rhodians a Sale was not compleated, nor other Contracts finished till they were publickly Registered.

2. And we must know, that if one and the same thing be twice sold, of the two Sales that shall stand good, which had the Property immediately transferr'd, either by Delivery or otherwise; for by this the Moral Power of the things goes from the Seller, which it does not by a Promise only.

XVI What Monopolies are against the Rights of Nature or the Rules of Charity.

XVI. All Monopolies (r) are not Repugnant to the Law of Nature, for they may sometimes be permitted by the Sovereign upon a just Cause, and at a certain Rate; as may appear from the Example of Joseph, when he was Governour of Egypt: So also under the Romans, the Alexandrians had the

(q) In Stobæus. Tit. de legibus.

(r) Are not repugnant to the Law of Nature. Every Body knows Thales's Story of the Olives. Pythocles's Invention of buying up the Tyrian Lead for the Advantage of the Athenians is in Aristotle. Oeconomic. iii. See Pliny viii. 37. of the Monopoly of Hedge-hogs which they us'd in dressing their Cloaths; and Procopius of the Ingrossing all the Silks, in his Hist. Arcan.

Monopoly, (s) as *Strabo* speaks, of all Commodities brought from the *Indies* and *Ethiopia*. The like may be done by private Persons, provided they are contented with a reasonable Profit. But they, who, as the *Oylmen* in the *Velabrum*, (t) do purposely combine to advance the Value of their Wares above a *Market-price*, tho' that's as high as it possibly can be, and so either by *Force* or *Fraud* prevent the *Importation* of any greater *Quantity*, or else agree to buy up *All* in order to sell 'em again, at a Rate very *Exorbitant*, considering the *Season*, commit an *Injustice*, and are oblig'd to make *Amends* and a *Reparation* for it. If indeed they do by any other means hinder the *bringing in* of Goods, or *ingross* 'em to themselves, to vend 'em *Dearer*, tho' at a Price not *unreasonable* for the *Season*, they act however against the *Rules of Charity*, as *St. Ambrose* proves by several Arguments in his *Third Book of Offices*, but properly speaking they violate no Man's *Right*.

XVII. Now as for *Money*, we must observe, that it naturally derives its *Currency* or *Equivalence*, (u) not from the *Matter* only, nor from this or that particular *Denomination* and *Form*, but from its general *Capacity* of being compar'd with, or answering the *Value* of all other Things, at least such as are more immediately *Necessary*. And it's

XVII. How
Money goes
for ev'ry
Thing else.

T 3

(s) As *Strabo* speaks.] L. xviii. See too *Cassiodore* ii. 4. and 26.

(t) Do purposely Combine.] 'Tis a Just and Prudent Law, C. de Monopol. And there is a very notable Passage in *Lysias* against the *Corn-Factors*, who advanced the Price of their Grain by raising false Rumors. Add to these *Cassiodore* ix. 5. and c. quicumque, Caus.

(u) Not from the Matter only, nor from this or that particular Denomination and Form but from its General Capacity.] Not so much from the Substance as the Value, l. 1. D. de Contrab. emptione. We must not regard the Species here, but the Worth of 'em, l. 6. §. 1. de solutionibus,

own Value, if it be not otherwise agreed, must be according to the Rate it bears at the Time, and in the Place of Payment; thus Michael Ephesius, Nicom. v. ως ἐστὶ χρεὶας τὸ πρὸς ἐμ. τὸ &c. Money it self varies, as all other Occasions do, according to the Plenty or Scarcity of it; for as we have not always the same Occasion to use other Things, so Money is not always of the same Value, but sometimes is more, and sometimes less worth; but yet (*) the Value of Money is what lasts longest, and therefore we use it as the Standard and Measure of all other Things it is compar'd with. The Meaning of which is this; That which is the Measure or Standard to other Things, ought in it self to be constant, and therefore Gold, Silver and Brass, are in themselves of the same Value, almost always and in all Places. But as other Things which are useful or necessary, are either scarce, or in abundance, so the same Money made of the same Metal, and of the same Weight, is sometimes worth more, sometimes less.

XVIII. By the Law of Nature no thing is be-
abated of the Rent or Hire on Account of Barrenness, or the like Accidents; and what if the first Tenant being not able to use it; it be Left to another?

XVIII. Letting and Hiring, as Caius well observes, is next to buying and selling, and is guided by the same Rules. That which answers to the Price, is the Rent or Hire; and that which answers the Property, is the possessing and enjoying the Benefit of it. Wherefore as when a Thing perishes, the present Owner bears the Loss; so when a Thing rented or hired proves barren, or any ways unprofitable, the loss is to the Tenant, nor has the Person who lets it any thing the less Right to the Money agreed for, because when he delivered the Thing to his Use, it was then worth as much as was contracted for; though this may be alter'd either by some express Laws, or some particular Agreements.

(*) The Value of Money is what lasts longest. Its Value is public and perpetual. d. l. i. D. de contr. emt.

ments. But if the Owner, upon the other's not being able to make use of it, shall let it to another, whatsoever he shall get thereby, he shall repay to him, who first took it, that he may not enrich himself by another Man's Due.

XIX. And what we have before said concerning selling, that the Price may be more or less, if what would otherwise not be bought, or sold at all, be bought or sold to gratifie another, the same may be understood of any Thing or Work, lett or hir'd. But if a Man by the same Pains can serve several Persons, as by carrying them from Place to Place, if the Undertaker shall oblige himself entirely to every one of them, he may demand the same Reward from each of them, as from any one of 'em, if the Law does not oppose it; because a second Person's receiving Benefit by my Labour does no ways Prejudice the Agreement made with the First.

XIX. How a just Salary may be increased or lessened,

XX. 1. As to Money Lent it is a common Question, by what Law is Usury forbidden? and tho' it be the general Opinion, that it is prohibited by the Law of Nature; yet *Abulenſis* thinks otherwise; neither are the Arguments on the other side weighty enough to convince one of the contrary. For whereas it is said of the Loan of a Consumable Commodity, that it is what is done Freely, (y) as much may be said too of the Loan of any other Thing that is not Consumable; and yet if any thing be

XX. By what Law Usury is forbidden.

T 4

required

(y) As much may be said too of the Loan of any other Thing that is not Consumable.] For these two Loans (the *Commodatum* and the *mutuum*) are very much alike, as *Locatio* and *Econeratio* are, the one, the Letting out of Goods the other of Money; in l. *Unica*, C. Theod. quod jussu est: pecuniam commodat. *Justinian* has made it in his Edition, *mutuam dat*. And *Horace* calls *nummos fœnere sumos*, Money taken up at Interest, *conductos*, Money hired, l. 1. sat. 2. where the Scholiast has *Mercor, Usura*.

quired for the Use of it, it may then cause the Contract to go by another Name, but cannot make a Moderate Interest unlawful. Neither is the Argument drawn from the Barrenness of Money more prevalent. For (2.) the Industry of Man has made Houses, and other Things naturally Barren, to become fruitful. The most plausible one is, that here one Thing is given for another, but the Use of a Thing cannot be distinguished from the Thing itself, when that very Use consists in the wearing and Consumption of it, and therefore nothing ought to be demanded for it.

2. But here we must observe, that when 'tis said, that the Use and Profits of Things Consumable, or of such whole Property passes to the Persons to whom they are Lent, were introduced by a Decree of the Senate, but that however, there were no such Use and Profits in Reality, the Controversie depends on the Word *Ususfructus*, Use and Profits, which Word certainly does no way, according to its proper Signification, imply any such Right; but however it does not thence follow, that such a Right is nothing, or of no Value, when on the contrary it is evident, that if any one would yield up such a Right to the Proprietor, Money might be demanded on that Account. So also the Privilege of not paying Money or Wine borrowed, till after such a time, is something that ought to be consider'd, for he pays less than his due, who pays not in due time. Therefore (a) *Ex causa pignoris*, in a Mortgage, the Profits of the Land answer the Use of the

(2.) The Industry of Man has made Houses, and other Things naturally barren, to become fruitful. Nor ought Money ever to be idle and Unprofitable. I. *quid ergo*, §. *Usuras*. D. *de contrar. et usul. act. titula. l. debitor*. D. *de Usuris*.

(a) *Ex causa pignoris*. I. *Cum debitor*. D. *in quibus causis pignus*. l. *causam*. §. *de Usuris*.

the *Mony*. But what *Cato*, *Cicero*, *Plutarch*, &c. and others alludge against *Usury* does not so much respect the *Intrinsic* Nature of the Thing, as what is often the Result, and Consequence of it. But whatever our Opinion may be of this Matter, we ought to be satisfied with the Law given by God to the *Hebrews*, which forbid one Jew to exact Interest for *Mony* lent to another. For the Subject of this Law, if not *Necessary*, is without doubt (a) *Morally* honest, and therefore (d) in the *fifteenth Psalm* it is reckoned amongst some other Things, that are highly *Moral*; as also in *Ezekiel* the *xviii*. Such Precepts then as these do oblige us *Christians* too, as being called to give more noble Instances of *Virtue*; and what *Moral Duty* the Law then enjoyn'd the *Hebrew*, or any *circumcised Person* (for they were both equally obliged) the same ought now to be observ'd by every Body, (e) all sorts of Distinction in People being entirely taken away by the *Gospel*, and the Word *Neighbour* extended to all Mankind. As that excellent Parable of *Christ* concerning the *Samaritan*, does fully demonstrate. And therefore *Lactantius* treating of the Duties of a *Christian*, says, *He shall not give his Mony*

(b) And others.] As *Appian* in *Civil*.
(c) *Morally* honest.] The *Hebrews* are of Opinion, that by the Word *W* is meant *Usury* for *Mony*; but that *W* signifies *Usury* for any Thing whatever. *St. Jerom* upon the *xviii* of *Ezekiel*: They think indeed that *Usury* consists only in the Interest of *Mony*: Which the *Divine Scriptures* providing against do in every Thing prohibit an immoderate Advantage, and oblige you to take no more on any Account, than you have given.

(d) In the *fifteenth Psalm*] and in the *cxi*. A good Man is merciful and lendeth.

(e) All sorts of Distinctions in People being entirely taken away by the *Gospel*.] *Arnobius* in his *iv*th Book says, that *Christians* generously impart what they have, and that to all Mankind, with as much Freedom as if they were their nearest Relations. And in another Place; They, who love all Men as their Brothers.

Mony upon Usury, for this is to gain by another's Misfortunes; and St. Ambrose, To assist a Man in his Wants is a Piece of great Humanity, but (f) to extort more than was borrow'd is severe and cruel. And Augustus Caesar himself blamed some, who took up Mony at an easie Rate, and lent it upon extravagant Interest.

XXI. What Interests do not come under the Name of Usury,

XXI. But yet we must observe, that there are some Contracts (g) which look like Usury, and are generally thought to be so, which however are Agreements of another Nature; as when what is demanded, is to make amends for the Damage the Lender sustain'd by being a great while out of his Mony,

(f) To extort more than was borrow'd. St. Cyprian de lapsis reckoning up several Grievous Sins subjoins, that one Extortion is advanced by another. St. Chrysostom de Jesuitis v. ead. vicesibus, Blæti &c. If you fast, pray see that you do not put your Mony out to make an unlawful Advantage of it. Do you fast? Cancel the Obligations of your violent and unjust Contracts. And the same Author upon the last Chapter of the 1 Corinth. says, that Mony gain'd by Usury, and given in Charity and Alms, is no more acceptable to God, than if it was so much from the Stews, the Price of Lewdness and Prostitution. St. Austin Epist. liv. What shall I say of Usury, which even the Laws and our Judges allow of? Is he more Barbarous who Cheats and Robs the Rich, than he who with his Exaction murders the Poor? Maximus homil. iii. de quadragesima: You will come to Church, Brother, as you ought to do, if that wretched Usury does not hamper, and intangle you in her deadly Snare. To these add St. Basil upon our Lord's Sermons on the Mount, and what Gratian has collected from the Sacred Councils and Writers, Cauf. xiv. Quest. iii. and iv.

(g) Which look like Usury. And if we would speak as the Roman Lawyers do, we should say, that Extortion indeed is an odious Name, but Usury is not so. Usury is impos'd not because the Lender desires to make a Penny of you, but because you, who borrow, defer your Payment, l. cum quidam. D. de Uuris. And Cujacius in paratit. de nautico fœnere; Extortion is what is demanded over and above the Principal merely for Advantage sake; Use is what is given more than the Principal, that the Creditor may not be a Loser. But because several have abus'd the Name of Usury, this too is now usually taken in the worse Sense; and the Word Interest is substituted in the Room of its better Meaning.

Mony, or in consideration of that Gain, which, had he not lent it, he might otherwise have made, and so something is deducted for the uncertainty of his Hopes, and for the Pain he must very probably be at. So likewise if any thing be demanded to defray the Charges of him, who lends Mony to several Persons, and keeps always some Cash by him for that very purpose; and if any thing be advanced for the hazard he runs of losing the Principal, where his Security is not extraordinary Good; this is not to be reputed Usury. And Demosthenes in his Oration against Pantanetus, positively denies, that he ought to be branded with the odious Name of an Usurer, who lends (b) for a moderate Advance, what he has got in his Business and by honest Labour, partly that he may preserve what he has got, and partly that he may oblige and accommodate some Body else.

XXII. And as for those Human Laws, that allow Interest, for the Use of Mony, or any other thing, as in Holland they have long allowed (i) 8 per Cent. per Annum to some, and 12 per Cent. to Trading People, provided that they keep within the Bounds of that just Consideration, which every Man ought to have for what he does or may suffer, by the want of his Mony or Goods; they are not repugnant to any Natural or Divine Right. But if they exceed this fair and modest Rate, the Laws (k) may indulge an Impunity, but they cannot grant a Right.

XXI. Interest do not come under the Name of Usury.

XXII. Liberty Power the Civil Laws have in this Affair.

XXIII. A

(b) For a moderate Advantage.] Procopius Gotth. i. i. speaking in the Praise of Germanus, Justinian's Relation; *Χρηματα τοις Σκοπουσι*, &c. He lent great Sums to all who had occasion for Mony, and never took of 'em any Interest at all, no not what was Really Reasonable.

(i) 8 per Cent.] So 'tis in the Empire.

(k) May indulge an Impunity.] And therefore Justinian look'd upon

XXIII.

What Rules
one must go
by in a Con-
tract for sa-
ving Harm-
less or of
Insurance.

XXIII. A Contract for saving *Harmless*, called *an Insurance*, is absolutely void, if either the *Insurer* does know at that time for certain, that the *Goods* they are treating about are already *Safe*, or the *Owner* that they are *lost*; and this not only on the Account of that *Equality*, which the *Nature* of such Contracts requires, but because the *Subject Matter* of this Contract is suppos'd to be a *Loss* consider'd, as *uncertain* and *suspicious*. And the *Price* of such an *Insurance* must be regulated and rated by the common *Rate*.

XXIV.

How one is
to be regu-
lated in a
Company or
Partnership;
where also
several
kinds of it
are ex-
plain'd.

XXIV. 1. (m) In a Company, where Trade is carry'd on by a *Joint-Stock*, if each Member contributes an *Equal Proportion* of *Money*, their *Gain* or *Loss* shall also be *Equal*, but if one advances more than another, then each Person shall be rated according to his *Quota*, which *Aristotle* thus expresses, *as you have contributed, so you have a share*. In a Partnership they are entitled to *most who put in most*. And the same is to be observ'd, where Persons concern'd together take an *equal Part*, or one does more than another; because my *Labour* may answer your *Money*, or your *Money* and your *Labour*; for as they usually say, *one Man's Money is but an even Recompence for another Man's Work*.

2. But this is not always done on one manner, for either I may give my *Work* for the *Use* only, for which the *Proportions* are not expressly named, they are to be understood as *Equal*, this only holds good where the *Quota* are *Equal*. But in a Com-

upon it to be his *Business* to regulate the *Interest*, that was permit-
ted before his *Time*, and to reduce it to a *juster Rate*; *Novell. 32.*

(l) In Insurance. *Suetonius* in his *Life of Claudius* said, that he took that *Hazard* upon himself. So *Cicero* took Security for the publick *Money*, that the *People* might run no Hazard in the *Carriage*

of the *East-India* Company. An Instance of Partnership you have in the *Dolphins*, observ'd by *Pliny*, l. ix. c. 8. and in the *Prawn* and *Shrimp*, ix. 40. and this *Cicero* mention'd too *de finibus*.

of your *Money*, in which case the *Principal*, whether *Lost* or *Safe*, is yours. Or may engage my *Work*, provided you find such a Sum of *Money* to carry on the *Business*, in which case I am a *Partner* in your *Principal*. In the former Instance the *Work* or *Service* is not set against the *Stock*, but the hazard of losing it and the *Gain* that might probably be expected from it. But in the other, the *Value* of my *Work* is added to the *Stock* of your *Money*, and therefore I must have a *Share* in the *Stock* Equivalent to it. What we have said of *Work* or *Service*, the same also may be understood of the *Labour* in, and *Hazards* of making a *Voyage*, and in such other Cases.

But that either of the *Partners* should share in the *Profit*, but yet be indemnified in case of *Loss*, is against the Nature of *Partnership*, but it may be so agreed on without any Injury; for then there will be a *mixed* Contract, of *Partnership* and *Insurance*, in which case an *Equality* will still be observed, if he who undertakes to make good the *Loss*, shall receive a greater Proportion of the *Gain*, than otherwise he should have had. But that any should bear the *Loss*, and not partake of the *Gain*, is for this Reason not to allow'd of, because a *Common* Share in the *Advantages* is a thing so *Essential* to *Partnership*, that it cannot subsist without it. And as to what the *Lawyers* say, that where the *Proportions* are not expressly named, they are to be understood as *Equal*, this only holds good where the *Quota* are *Equal*. But in a *Company* where the *Stock* is all they are *worth* in the *World*, not what is gain'd by this or that Man's particular Contributions, but what might probably be expected from 'em, must be regarded.

XXV. When a *Fleet* is fitted out against *Py- rars* by a *Joint-Stock*, the common Advantage consists in their common *Defence*; and sometime

XXV. of
a Sea-Com-
pany.

in taking of Prizes. But the Ships, and all that are in the Ships, are usually appraised, and the Value brought into a Sum Total, that so the Proportions of the Keyels and Effects, may each of them bear his Share of the Damages and Expences, (n) in Proportion to what they respectively have in that Sum, among which Damages and Expences those of the wounded are to be reckoned. And what we have hitherto said, is agreeable to the very Law of Nature.

XXVI.
By the Law of Nations an Inequality in the Terms, if agreed upon, is not minded as to External Acts; and in what Sense this is said to be Natural.

XXVII. Nor does the Voluntary Law of Nations seem to make any Alteration here, only in this one Particular, that where the Contributions are unequal, yet if they are consented to, and there be no lie in the case, nor any thing concealed, which should have been discovered, in all External Actions, they shall be look'd upon as Equal; so that, as by the Civil Law, before Dioclesian's Constitution, no Action was allowed in Court against such an Inequality; so neither now among those who are, by the Law of Nations only, form'd into Companies, can there be any Redress or Constraint on that Account. And this is what Pomponius means when he says, that in buying and selling one Man may Naturally over-reach another, where the word *naturally* does not signify that it is just and Lawful so to do, but only that it is so far permitted, that there is no Remedy provided for it against him, who is resolv'd to insist upon, and justify himself by his Agreement.

(n) But Naturally, in that and some other Places, is put for what is every where Customarily received.

(n) In Proportion to what they respectively have in that Sum. See something like this in L. Wisigoth. l. v. c. 5.

(o) But Naturally in that and some other Places. So Gellius l. ix. c. 10. speaking of the Conjugal Act; a thing by the Law of Nature to be done in Private.

received. In which Sense Nature is said by the Apostle St. Paul to teach us, that if a Man have long Hair it is a shame unto him; when at the same time 'twas no ways Repugnant to Nature, and was what several People practis'd. So the Author of the Book of Wisdom calls Idolaters, but not all sorts of Men, *Quia iugiter vain by Nature*; and the Apostle St. Paul, *τηναι φύσει όφρυναι*, by Nature the Children of Wrath, speaking not so much in his own Person, as in that of the Romans among whom he then liv'd. And Evemerus an Ancient Poet: X

*Ουκ αν πολυχεθριον μελιντι ερπωαι, φιλε, η ον
Τειοτην ανθρωποιον πελευρωσαν φυσιν ην.*

The Habit, Sir, that Care and Time produces
Is what the World styles Nature, and I think it's so.

In which Sense too there's an old Expression of Galen, *Ενδεκτης φυσικα εδω, Cystem is an acquired or a second Nature*. So likewise Thucydides, *Η ανθρωπινη ηγενησαστα η ανθρωπινη φυσικη*, Human Nature is above Laws. So the Greeks call Virtues and Vices, which are become habitual, *αδωμωδωσπα*, Naturaliz'd; and we read in Diodorus Siculus, *ο φυσικος τοος εστιν ανθρωπινη φυσικη*, When Nature, that is, the Strength of the Mind, is overcome by Necessity. Thus Pomponius the Lawyer, when he had said, that the Roman Law does not suffer the same Person, if of the Rank of those who do not bear Arms, to die Intestate, had he ever once made a Will, subjoin'd, that there's a Natural Contradiction in these Things, tho' that Rule depended on the Custom of the Romans only, nor was it practis'd by other Nations, nor even by the Romans themselves, (p) in the case of a Soldier's Will.

3. And

(p) In the case of a Soldier's Will. Nay, and often too in the Wills of Persons in a Civil Capacity, where any Dispute arises about an

3. And the Advantage of having such a Rule, as I was speaking of, introduced, was evident; for it cuts off Infinite Disputes, which could not possibly be decided, by reason of the uncertain Prices of Things among those who had no common Judge to appeal to, nor avoided, if any Man might go back from his Bargain, upon Pretence of being unequally dealt with. 'Tis the Essence or Substance of buying and selling (say the Emperors, meaning by the Word *Essence* or *Substance*, the constant Custom or Way) for the Buyer to beat down the Price, and the Seller to raise it, till (q) after many Words on both sides, the one falling a little from his Demands, and the other rising in his Bidding, they agree at last in a certain and fix'd Price. Seneca with an Eye to this Regulation says, *What signifies what they cost, if the Buyer and the Seller are agreed about the Price? No Thanks to the Seller, if he has got a good Bargain.* And Andronicus Rhodius to the same purpose; *ἐν τοῖς ἐμπορίαις &c.* Where the Agreement is voluntary, there's no Injustice in an Advantage, nor is there any Amends to be made for it. For the Law has granted an Impunity in such cases.

4. The Author of *Isidore's Life*, whom I lately mention'd, calls the Buying too cheap, and the selling too dear, *ἀδίκαιον καὶ μὴ τὸ ὕψους ἀγοράσαντος καὶ πικρῶς ἀναγορεύοντος*, an Injustice tolerated indeed by Law, but which in the main overturns all that's equitable and honest.

C H A P.

Inofficious Will, a Will which entirely leaves out, or very slightly provides for those who ought chiefly to be consider'd, l. *Mater*. l. *Nam et si*. l. *circa*. D. *de inoff. Testaments*. As also l. *cum ductus*, C. *de inoff. et*. as before.

(q) *after many Words*.] Festus; Hagleri (Cociones) sunt to be call'd so (a Cunctatione) from their Tedioufness and Hagling, because they are a long time Bargaining before they come to a Conclusion in the Price; and therefore the first Syllable was writ formerly with the Letter V. Quintilian Declam. pro Civibus; *Diu Cocionatus est*. He was a great while hagling about it.

(r) *Tolerated indeed by Law*.] So Andronicus Rhodius at Nicomach. v. c. 5. in the end; *τέτοις ὅς ἀδικαίαν ἔδωκεν νόμος*, For the Law has granted an Impunity in such Cases.

CHAPTER XII.

Of an Oath.

I. In every Nation, and in every Age, an Oath has always been of the greatest Weight and Consideration in Promises and Contracts. For as Sappho-
cles says in his *Hippodamia*,

I. How great the Authority of an Oath is even in the Opinion of the Heathens.

*An Oath with sacred Awe restrains the Soul,
And keeps her back from the double Mischief
Of obliging Friends, and angering Heav'n.*

Our Ancestors, says Cicero, could never find out any thing stronger than an Oath to bind us to the faithful Discharge of what we had engag'd.

2. And therefore it was ever a receiv'd Opinion, that some very grievous Punishment would attend Persons forsworn; as *Eusebius* has observ'd, speaking of Swearing:

*From whence dire Plagues and dreadful Slaughters
come*

On Bale and Perjur'd Wretches.

Inasmuch that (a) Posterity was thought to be punish'd for the Faults of their Predecessors this way, an Opinion that was never entertain'd but in cases of the most enormous Crimes: Nay, that the bare Will and Design, without the Fact, would certainly draw down a Vengeance on it: *Herodotus* confirms both these in his Story of *Glaucus Epicyonides*, who had only deliberated with himself,

Vol. II.

U

whether

(a) Posterity was thought to be punish'd for the Faults of their Predecessors. See *Sermon* in Excerpt. *Eusebii*, upon 1 *Corinth.*

whether he should falsifie the Oath he had taken of being true to a certain Trust impos'd in him; where that Author produces these Verses of Pythias,

*But Perjury's the Parent of a nameless Issue,
Which, without Hands or Feet, shall quick Advances make,*

(b) And seize and Ruin all before him.

And Juvenal reciting the same Affair, concludes thus;

*Thus suffer'd be for the Imperfect Will
To Sin, and bare Design of doing Ill.* Creech.

3. Cicero says very judiciously and well, that an Oath is a Religious Affirmation; and whatever is promis'd after such a manner, calling God, as it were, for a Witness to your words, ought punctually to be perform'd. But as for what he adds, and this we are to do in regard to Honour and Justice, and not out of any Fear of the Anger of the Gods, for there is no such thing incident to their Natures, if by Anger he means a Passion or Disturbance, he is in the right of it; but if he intends a Will, or Inclination to Punish or Revenge, it is no ways to be allowed, as Lactantius handsomely proves. Let us see now whence this sacred Power of an Oath arises, and how far it extends.

II. That a deliberate Mind or Intention is required in such an Affair, I mean, that he who swears is willing to do so.

II. First, What we have already said of Promises and Contracts, is also true in case of Oaths, that he who swears should be in his right Senses, and consider before-hand what he is going to do. And

(b) And seize and Ruin all before him.] See Zechariah 5. 1, 2, 3. and St. Chrysostom de statuis 15. interpreting that Passage,

Chap. XIII. WAR and PEACE.

291

And therefore if a Man not *designing* to swear, should inconsiderately utter words importing an Oath, (c) as is related of *Cydippe*, one might say of him what *Ovid* attributes to her.

Quæ jurat mens est; nil conjuravimus illa.

(d) *It is the Mind that swears; with that we never Swore.*

taken out of *Eurypides*, who said in his *Hippolitus*,

Jurata linguâ est, mente juravi nihil.

My Tongue 'twas swore, (e) my Heart did nothing swear.

U 2

But

(c) *As is related of Cydippe.*] There's such another Story in the *Metamorphoses* of *Antoninus Liberalis*, about *Cressylla* and *Hermochare*.

(d) *It is the Mind that Swears.*] In the very same place,

*Consilium prudensque Animi Sententia jurat,
Es nisi Judicii vincula nulla valent.*

*Oaths must from Wisdom and from Thought result,
And if the Judgment's wanting, no ways bind.*

And immediately after,

*Sed si nil dedimus præter sine pectore Vocem,
Verba suis frustra viribus orba tenes.
Non ego juravi: legi jurantia Verba, &c.*

*If All we said was only empty Sound,
Nor was our Heart concern'd, in vain you think
That by our words we're tied; I did not Swear,
But read the Form the Sacred Oath contains.*

(e) *My Heart did nothing Swear.*] Because *Hippolitus* thought the Nurse intended that some honest Action was to be conceal'd; he did not imagine that she meant *Adultery* and *Incest*.

But if any one *willingly* Swears, tho' he is not willing to be *bound* by that *Oath*, he is however *oblig'd* to stand to it, because an *Obligation* is inseparable from an *Oath*, and the immediate and inevitable Consequence of it.

III. The words of an Oath oblige in that sense, in which he, to whom we swear, is believed to understand 'em.

III. 1. Some are of Opinion, that tho' a Man solemnly pronounce the words of an *Oath*, yet if it be not with an *intent* to swear, he shall not be *obliged* by that *Oath*, but he sins by *swearing rashly*. But it is more certainly true, that he is bound to perform, what he has called God to witness. For that *Act*, which is of it *self* binding, proceeded from a deliberate Mind. And therefore, tho' what *Tully* says holds generally good, that *not to do what you have*, according to your Judgment and Opinion, *Sworn, is Perjury*. As also what *Calypso* in *Homer*, swearing to *Ulysses*, says,

Ἀλλὰ τὰ μὲν νοέω καὶ φράζομαι.

But what I think I speak.

2. Yet has it this Exception, unless he who Swears, *knows*, or does probably believe, that the Person he deals with takes the words in another Sense; for he who calls *God* to witness what he's saying, is obliged to perform his word (f) in that

(f) In the Sense wherein he thinks himself understood] *St. Austin*, Epist. 224. speaking of one who going upon his *Parole* out of the *Carthaginian* Camp. return'd thither again, and then went to *Rome*: Those who remov'd him from the Senate. did not so much regard what he intended when he swore. as what they, to whom he took the Oath, expected from him. See also what follows there. Look for what is very handsomly said upon this Subject in the *Trofeian* Council, concil. tom. 3. Edit. *Sirmond*. And in *Hicmarus's* little Treatise de divorcio *Lotharii & Teshberga* upon Interrog. 6, where agreeably to his Opinion 'tis very justly said of God,

that Sense wherein he thinks himself understood; and this is what the same Cicero alledges, *You are oblig'd to stand to what you swear, if you swear in such a manner that he who requires or administers the Oath, is perswaded that you ought to perform it.* And in Tacitus we read, *The Wretches who are conscious to themselves of the Crime they are charg'd with, tremble and falter in their Speech, and with a thousand Arts and Shifts change and alter the words of their Oath.* And St. Austin, *They are perjur'd, who tho' they kept to the words of the Oath, have yet deceiv'd the expectation of those they swore to.* And (g) St. Isidore, *Tho' the words of an Oath be never so craftily contriv'd, yet God, who is the witness of the Conscience, takes it so, as he, to whom we swear, understands it.* And this is what they call (h) *liquido jurare, to swear with a safe Conscience.*

U 3

*Qui non ut juras, sed ut is jurasse putavis
Cui juras, audit: Sic es utrique reus.*

*Who does not mind what you do really Swear,
But what the Person whom your Oath concerns
Did think you Swore; so are you Bound to both.*

In the Jew's Oath throughout Spain: If you don't do it with the same Intention, as I declare to you, your words were heard and understood by us to mean.

(g) St. Isidore.] L. 11. de summo bono, c. 31. 1. 'tis quoted caus. 22. quest. 5. c. quacumque.

(h) Liquido jurare.] Donatus upon that Passage in the Fair Andrian:

*Quia si forte opus ad herum jure jurandum mihi,
Non opposuisse ut liquido possim.*

Because if my Master puts me to Swear, whether I laid it there or no, I may do't with a safe Conscience. Liquido that is, pure & manifeste, with Sincerity and Unreservedness. Nicetas in his Life of Alexius, blaming Andronicus Comnenus's Deceit, says, *χρῆναι μὴ ἑωυτοῦ βεβῆναι &c.* We ought not to adulterate our words by giving 'em ano-

ther

science. And therefore *Metellus* did well in refusing to swear upon the *Apuleian Law*, tho' he was informed that it was unduly made, and that an Oath taken upon it was to be understood, in case that Law was rightly enacted.

3. For tho' in other *Promises* some *tacit Condition* may be supposed, which may absolve the *Promiser*, yet in *Oaths* no such thing is admitted; to which that remarkable Expression of the Apostle to the *Hebrews* is admirably pertinent, *God willing more abundantly to shew unto the Heirs of the Promise, the immutability of his Counsel, confirmed it by an Oath; that by two immutable things, in which it was impossible for God to deceive, or lie, (for so I think the word $\psi\upsilon\delta\epsilon\alpha\varsigma$ is properly render'd, as plain speaking is called Truth, Dan. vii. 16. viii. 26. x. i.) we might have a strong Consolation.* To understand which words, we must know, that the Penmen of the Holy Scriptures do often speak of God $\alpha\upsilon\theta\rho\omega\pi\omicron\pi\alpha\theta\omega\varsigma$, after the manner of Men, and rather as he appears to us, than as he is in himself.

4. For God does not really alter his Decrees, tho' he is said to *change*, and (i) *repent*, as often as he does otherwise than his words seem to imply,

their turn, but to speak 'em freely in the Acceptation such Expressions bear. And the same Author in another place speaking of *Alexius*, who catch'd at words contrary to their Design and Meaning, $\tau\omicron\iota\varsigma \pi\eta\mu\alpha\sigma\iota \tau\epsilon\tau\omicron\iota\varsigma \epsilon\gamma\chi\alpha\theta\acute{\iota}\sigma\alpha\varsigma, \omega\varsigma \acute{\alpha}\iota \mu\upsilon\tau\iota\alpha\iota \tau\omega \mu\acute{\alpha}\lambda\omega\pi\iota$, sticking on what was said, as Flies upon a Sore. The Court of *Arcadia* did very heinously offend against this Rule, which made a Person who had come to *Constantinople*, to be murder'd at *Chalcedon*, tho' they had upon their Oaths promis'd him Safety. *Sozomenus*, c. 5. Add to this what's below, ch. 16. §. 2.

(i) *Repent.*] The Council of *Toledo* 8. c. 2. For to Swear, in God, is upon no account whatever to alter what he himself has decreed; but to repent, is to change what he has ordain'd, whenever he pleases. *Gratian* has put this in *caus. 22. quæst. 4.* But pray explain it as in our Text,

ply, (k) by reason of some Condition *tacitly* understood, which condition then ceases, *Jer. xviii. 8.* You may find Instances of this kind in *Gen. xx. 3. Exod. xxxii. 14. 1 Kings xxi. 29. 2 Kings xx. 1. Isai. xxxvii. 1. Jonah iii. 5, 11.* In which sense too God may improperly be said to *deceive* us. And 'tis usual for the word *Προσέδοξ*, which is in the aforesaid Passage to the *Hebrews*, to signify an Event that *deludes* our Hopes, as we may see both *there* and in *Levit. vi. 2. Jos. xxiv. 27. Isai. lviii. 11. Hos. i. 2. (l) Habak. iii. 17.* And this is a thing frequent in *Threats*, because they confer no Right on any Body. And sometimes 'tis so in *Promises*, where there's an *implicit* condition.

5. And therefore the Apostle mentions *two* things, which imply an *Immutability*, a *Promise*, because it gives Right to the Person to whom it is made; and an *Oath*, because it admits of no Conditions that are *tacit*, or any ways obscure and conceal'd; as we find *Psal. lxxxix. 30, 31, 32, 33, 34, 35, 36.* But it is another case, if the nature of the Affair plainly *discovers* and points out any *Conditions*; to which some refer that of *Numbers xiv. 30.* But the *promised Land* may be better understood as given by an Oath, not to those very *Persons*, but to the *People* (or *Nation*) of the *Jews*, to the *Posterity*, for instance, of those to whom God had then sworn, *ver. 33.* And such a Promise might be performed at any time, nor is it limited to any particular Persons.

IV. 1. From what has been said, we may learn what to judge of an Oath procured by *Fraud* or *Surprise*. For if it be certain, that he who *swore*

IV. An Oath procured by Fraud, when binding.

U 4

(m) sup-

(k) [by reason of some Condition tacitly understood.] See Seneca, *Natur. quest. 11. 37.*

(l) [Habak. iii. 17.] Add *Job xli. 1. Hosea ix. 2.*

(m) supposed something to be *done*, which really is *not*, and that unless he had believed so, he would not have Sworn, that *Oath* shall not *bind* him. But if it be doubtful whether he would not have Sworn, tho' he had not been thus mistaken, he shall then stand to his words, because *Simplicity* and *plain Meaning* is what is most agreeable to an *Oath*.

2. And hither I refer the *Oath*, which *Joshua* and the *Princes* of the *Congregation* of *Israel* made to the *Gibeonites*; they were indeed deceived by the *Gibeonites*, who pretended to come from a far Country. Yet it does not thence necessarily follow, that if *Joshua* and the *Princes* had known that they had been their *Neighbours*, they would not have spar'd them. For as to what they said, to the *Gibeonites*, *Peradventure you dwell among us, and how shall we make a League with you?* It may be taken in this Sense, that the *Gibeonites* were asked

(m) Suppos'd something to be done, which really is not.] As *Hippolytus*, whom we spoke of just now; upon that of *Sophocles* in *Oedipus Coloneus*,

Ἀπάται δ' ἀπάταις
Ἐτέραις ἐτέρᾳ παραβαλλόμενα
Πόνον ἔ' χρεὺν ἀνίδουσιν ἔχει.

One imposition upon another
Is not with Thanks but with Ruin pay'd.

He delivers himself thus, καὶ αὐτοὶ ἐνομίζουσιν &c. And they think themselves no ways to blame for receiving him, and promising him Safety, since they did not know before that he labour'd under any Domestick Guilt. And to this purpose is that Passage,

Ἡ γλῶσσαι ὁμώμοχ' ἢ ὃ φρενὶ ἀνώμοσθε.

My Tongue 'twas sworn, my Heart did nothing Swear.

For he himself was deceiv'd when he swore.

asked what manner of *League* they desired, whether to be admitted as *Allies* or as *Subjects*; or it might be to shew that it was not lawful for the *Jews* to enter into an *Alliance* with some People; but not that it was prohibited 'em to save the Lives of those who *Surrender'd* themselves to 'em. For the Divine Law which commanded them to destroy those Nations, (*n*) being compared with another *Order*, may be understood with this Limitation; *unless they immediately and upon the very first Summons submitted and did as was injoin'd 'em!* Which among others is proved by the Story of *Rabab*, (*o*) who for her good Services was saved; and by the Example of *Solomon*, who receiv'd those who were left of the *Canaanites* upon condition of their *Obedience*, and Payment of *Tribute*.

3. And to this purpose is what is observ'd in the Book of *Joshua*, that there was not a City of those *seven* People that ever offer'd to make *Peace*; for they were *harden'd* on purpose that they might be incapable of any Favour. Since then, it is very likely, that had the *Gibeonites* declar'd the matter as it *really* was, which for *fear* they did not, they would however have been allow'd *Quarter* upon condition of their *Obedience*, the *Oath* was

(*n*) *Being compar'd with another Order.*] Yes, and if compar'd with the Reason subjoin'd to the Command of destroying 'em, *Exod* xxiii. 33. *Deut* vii. 4. For that Reason *ceases* in those who undertake to observe the Precepts of *Noah's* Sons and pay *Tribute*. So *Maimonides* and *Samson Mi-cosi*, and *Moses de Kotzi* in *Præcep. juhen.* 15. and 118. are of Opinion.

(*o*) *Who for her good Services was sav'd.*] And by an Instance in the Inhabitants of *Gezer* in the History of *Joshua*, xvi. 10. And that the *Gergesenes*, or *Gezerites*, remain'd 'till our Saviour's Days appears from the Gospel, *Matt.* viii. 28. For these submitted at the very first, and therefore are not reckon'd in the Catalogue of *Enemies*, *Deut.* xx. 17. *Jos.* ix. 1.

was valid, inſomuch that very grievous Punishments were, by God's own Order, inflicted on them, who afterwards preſum'd to violate it. (p) St. Ambroſe treating of this Story ſpeaks of it thus, *Joſhua did not think fit to break the Peace he had granted, becauſe it was confirm'd with the awful Solemnity of an Oath, leſt whiſt he was blaming the Perfidiousneſs of others, he himſelf ſhould be worſe than his word, and forfeit his own Honour.* But however, the Gibeonites did in ſome meaſure ſuffer for their Fraud, being immediately, upon their Submiſſion to the Hebrews, adjudg'd (q) to a ſort of Personal Slavery; whereas had they dealt frankly, they might have been receiv'd as Tributary States.

V. The Words of an Oath not to be extended beyond their uſual Senſe and Acceptation.

V. Nor ſhould the Meaning of an Oath be extended beyond the uſual Senſe and Acceptation of the Words. And the Tribes therefore were not Perjur'd, who, when they had ſworn not to give their Daughters in Marriage to the Benjamites, did yet ſuffer 'em to keep and enjoy the Women they had ſtolen. For (r) it is one thing to give, and another not to demand again what is loſt and gone. Of this Fact St. Ambroſe ſpeaks thus, *Which Indulgence of theirs was not without a Punishment in ſome meaſure ſuitable to their ungovernable Paſſion, whiſt*

(p) St. Ambroſe.] De Officiis 3. c. 19.

(q) To a ſort of Personal Slavery.] As were the Brutians formerly by the Romans. Gellius 10. 3. Feſtus in the Word Brutiani.

(r) It is one thing to give, and another not to demand again what is loſt and gone.] Joſephus ſays in this Hiſtory, ὅτι ἀεγοεπομεναι, ὅτε καλὸν ἔστιν. Neither encouraging 'em to it, nor forbidding 'em. Seneca Excerpt. 6. 2. He is obnoxious to the Law, who himſelf relieves an Exile, but not he who ſuffers him to be relieved. Symmachus, Why does he endeavour to ſcare a Religious Mind with Unjuſt and Cauſeleſs Fears, becauſe he aſſerts that you are in Conſcience guilty of contributing towards the Affair, unleſs you crush the Envy of thoſe who ſlander you with it.

whilst they were only permitted to steal themselves Wives, and not to enter upon that State with the Sacred Solemnity of lawful Matrimony. Not unlike this was that Request which the Achæans made to the Romans, who did not approve of some things which they had done and confirmed by Oath, that the Romans would be pleased to alter what they had a mind to; but not to oblige the Achæans by any Religious Vow to make void what they had themselves established by Oath.

VI. That an Oath may be binding, (f) the Obligation must be lawful: For, if a thing promised upon Oath be forbidden, either by the Law of Nature, by the Divine Law, or even by an Human Law, of which we shall quickly treat, it shall have no Power at all to oblige us, (t) Philo the Jew said well in this Case, ἴσω ὃ πᾶς ἐννοήτως ἀδυνα δρᾶν ὅτι &c. Let him who is going to do an unjust Action because he swore he would, know that he is so far from discharging his Oath by this means, that he really breaks it; an Oath is a Sacred Thing, and deserves the greatest Circumspection and Care in the Management of it, as being the Seal and Sanction of the best and justest Resolutions. For he does but add one Sin to another; who to a wicked Oath joins a wicked Action, since it would have been much better to have entirely desisted. And therefore he who refrains from doing what is Ill testifies his Respect and Veneration for God, and takes the right Method of obtaining, for what he Inconsiderately swore, Pardon and Mercy, Mercy, the Essential Property of that Great Being.

VI. The Oath that engages any thing unlawful does not oblige.

IV

(f) The Obligation must be lawful.] This Matter is handled very well by St. Ambrose de Off. 1. and some other Authors inserted in Caus. 22. quest. 4. And to the same purpose is the 7th Canon of the Council of Atrada in Consil. Gall. Tom. 3. and several more in Rincomar's Works.

(t) Philo.] De Specialibus Legibus.

Being. And it would be incurable Folly, and unaccountable Madness to chuse a double Evil, when one might be excus'd for half. We have an Instance of this in David, who spared Nabal, tho' he had sworn to kill him. And Cicero gives such another Precedent in Agamemnon's Vow, and Dionysius Halicarnassensis in the Conspiracy and Joint-Oaths of the Decemviri to seize upon the Government. Accordingly Seneca says,

*Præstare fateor posse me tacitam Fidem
Si scelere careat: interim scelus est Fides,*

(Where *Interim* signifies *Interdum*.)

*What I have promis'd, I own, I can perform
If there's no Crime in't; sometimes 'tis a Crime
To keep one's Promise.*

And St. Ambrose: Some Promises cannot be comply'd with, nor some Oaths observ'd without acting against a Principle of Duty. And (u) St. Austin, If Faith and Honour be engaged to make way for Ill, I wonder we should dare to call it Faith and Honour. The same does St. Basil teach us in his second Letter to Amphilochius.

VII. Or if
it hinders
any greater
Moral
Good.

VII. 1. Nay, tho' what is promis'd be not *Illegal* and *Unjust*, (x) but only hinders some greater Moral Good; in this Case also the Oath shall not be

(u) St. Austin.] De bono Conjugali, c. 4. This is cited in the aforesaid Question. See too Gaius de pace publica, l. 1. c. 4. §. 16. and the Story of Albinus in Paul Wernafred, l. 11. c. 26.

(x) But only hinders some greater Moral Good.] Such an Oath was that of Honorius, who swore that he would never make Peace with Alaric, as Zozymus relates the Affair. See c. amongst several other things in the above-mentioned Question, and the Council of Ilerda in Concil. Gall. Tom. 3. Canon 7. and Hincmar too in the aforesaid Treatise at interrog. 14. l. de divortio at interrog. 6, and 14.

be obliging, because we stand so much indebted to God for our Endeavours to Grow and Improve in Virtue, that it is not in our Power to deprive our selves of the Blessed Liberty of doing all the Good we can. There's a remarkable Passage in that *Philo Judæus* I just mentioned, not impertinent to the Affair in hand, and is very well worth our inserting here, εἰσὶ δ' οἱ τὴν φύσιν ἀμίχλοι &c. *There are some People of so Morose and Unsociable a Nature, either in Hatred to all Mankind, or as being so much in Slavery to their own Fury and Passion, that they confirm this unhappy Churlish Temper even by an Oath, and so solemnly Swear that they will never suffer such a one to take a Meal's Meat with 'em, or ever to lie one Night in their House; that they will never do this or that Man the least Piece of Service, nor indeed will they ever be beholden to him themselves for any as long as they live.* What he says that some Folks *swore* (γ) that they would never do this or that Man any the least Piece of Service, the Hebrews called נוד הנאח, that is, ἐν γνην ὠφελείας, the Vow of Assistance or Beneficence: שבוע לזכות an Oath to do Good, Lev. v. 4. The Form of this, as the Rabbins tell us, was שאתא נהנחלי סהרתחנה סני קרובנל or שאתא נהנחלי קרבו *All the Advantage that you might receive from me is Dedicated to God*; agreeable to which is the Syriac in the old Version of *Matthew* xv. 5. קרבני טרם רתחנהא טני in Greek δῶρεν δ' εἰς εὐεργετίας, that is, *It is a Gift consecrated to God* (for this is what is meant by קרבו κορβαῖν) *by whatsoever thou mightest be profited by me; and therefore it would be Sacrilege in you to make use of it.*

2. The

(γ) *That they would never do this or that Man any the least Piece of Service.* See *Baba Kama* c. 9. §. 10. and the Learned *Constantine's* Observations there.

2. The Hebrew Doctors, who were very ill Expositors in this Respect of the Divine Law, thought that a *Vow* under the Penalty of Consecration was valid and binding, tho' made in Prejudice to their own Parents: Which Opinion Christ refutes in the Place just cited, where the Word *תקן* to honour, signifies to assist and be kind to, as appears by comparing it with some Passages in St. Mark, and St. Paul 1 Tim. v. 3, 17. and Num. xxiii. 11. But if the Oath, or the Vow, were design'd to the Disadvantage of any other Person, in this Case too we might very justly say, that it is no ways obliging, because, as we observed before, it's against that Proficiency and Advancement in doing Good, to which all our Endeavours ought to be directed.

VIII. Or
if the Thing
engaged for
be im-
possible.

VIII. It's to no purpose to say any thing at all of what can never be perform'd. For it is evident enough, that no Body can be oblig'd to a thing absolutely impossible.

IX. What
if that Im-
possibility be
only for a
Time?

IX. As for what is impossible indeed for the present only, or because one supposes it to be so, the Obligation continues in suspense; but so that he who swore upon such a Supposition is oblig'd to take all the Care he can to render that, which he has promis'd upon Oath, to become possible.

X. Folks
swear by
the Name of
God, and
in what
Sense they
do it.

X. The Form of Oaths may be different in Words, but the Substance is the same. For all are understood to appeal to God in this manner; for Instance, Let God be my Witness, or let God be my Avenger, which both amount to one and the same thing. For (2) when we call him to witness,
who

(2) When we call him to Witness who has a Power and Right to punish, we do at the same time desire him to revenge our Perfidiousness.] St. Ambrose to the Emperor Valentinian, What is Swearing but an Acknowledgment of his Divine Power, whom you appeal to as the Observer and Guardian

who has a Power and Right to punish, we do at the same time desire him to revenge our *Perfidiousness*; and he who knows all things is an *Avenger* of the Crime by the same Reason that he is a *Witness* of it. *Plutarch* says, τὰς ὀρκῶν εἰς κατὰρκον τελευτᾷ τῆς ἐπιπορίας, Every Oath ends in a Curse upon Perjury. And to this the old Forms of making Leagues, by killing of Sacrifices, allude; as appears, *Gen. xv. 9.* and in what follows there. And that of the Romans in *Livy*. Tu Jupiter, ita illum ferito, ut ego hunc Porcum. Do thou, O Jupiter, smite him (if the Violator) as I do this Hog. And in another place, Deos precatus, ita se mactarent, quemadmodum ipse agnum mactasset. He prays the Gods so to kill him as he did that Lamb. And in *Polybius* and *Festus*, Si sciens fallo, ita me Diespiter ejiciat, ut ego hunc lapidem. If I knowingly deceive you, let God cast me away as I do this Stone.

XI. 1. It was an old Custom to Swear also by the Name of other Things and Persons, whether thereby wishing that those things might prove hurtful to them (if they swore falsely) as the Sun, the Earth, the Heavens, the Prince; or that they might be punished in them, as in their Head, their Children, their Country, their Prince: Nor did Profane Nations only use to Swear thus, but the Jews too, as the same (a) *Philo* informs us; for he says it is not fit when we Swear upon every slight occasion, immediately ἐπὶ τὸν ποιητὴν καὶ πατέρα τῶν ὄντων ἀνατρέχειν, To have recourse to the Creator, and Father of All Things; but to Swear by Parents, by Heaven, by the Earth, by the Universe. Something like this is observ'd by the Interpreters of *Homer*,

XI. And by the Name of other Things too with a Regard to God.

Guardian of your Faith and Integrity. See an excellent Form of Chaganus Ananor. in Menander's Excerpt. legat.

(a) *Philo.*] De Specialibus legibus.

Homer, who say that the Ancient Grecians did not use *περὶ τῶν θεῶν ὀμνῆσαι ἀλλὰ καὶ τῶν περὶ συγγενῶν*, To Swear precipitately by the Gods; but (b) by such things as were at hand, as by the Scepter. And this Custom *Porphyrus*, and the Scholiast upon *Aristophanes*, say was brought up by *Rhadamanthus*, a Prince eminent for his great Justice. Thus we read that *Joseph* swore by the Life of *Pharaoh*, according to a received Custom of the Egyptians, as *Abenesdras* observes there, and (c) *Elisha* by the Life of *Elijah*. Nor does *Christ*, *Matt. v.* as some think, allow such Oaths to be less binding than those which are expressly made in the Name of God; but because the Jews did not so much regard these, being prepossess'd with such an Opinion as he was, who said *Sceptrum non putat esse Deos*, he does not believe the Scepter to be the Gods; he shews that even these are True Oaths. For as *Ulpian* has very well observed, he who swears by his own Life, seems to swear by God, (d) for he swears with an Eye and Respect to some Divine Power; so *Christ* tells us, that he who swears by the Temple, swears by God who presides there, and that he who swears by Heaven, swears by God, whose Throne it is.

2. But the Jewish Rabbins of those Times were of Opinion; that an Oath made by created Things was not obliging, unless some Penalty were added to it, as if the Thing by which they swore were consecrated to God. And this Oath they called

קורבן,

(b) By such things as were at hand.] *Apollonius* speaking of *Socrates* in *Philostratus*, 6. ὁ μὲν ταῦτα ἔχ' ὡς θεῶν, ἀλλ' ἵνα μὴ θεὸς ὦ μὲν. He swore by these things not as Gods, but that he might not swear by the Gods.

(c) *Elisha* by the Life of *Elijah*.] *Add* 2 Kings iv. 30. Cant. ii. 7.

(d) For he swears with an Eye and Respect to some Divine Power.] So does *Gratian* think, *Caus. xvii. quæst. 1.*

καρῶν, or ἐν τῷ δώρῳ, by way of Gift, whereof mention is made not only in St. Matthew, but also in the Tyrian Laws, as we learn from Josephus in his Dispute against Appion. And for the same Reason, I suppose, it was that the Greeks called the Eastern People, καρβανῆς, Offering-Makers, which word we find in Æschylus and Euripides; and καρβάνα δ' αὐθας, Oblations and Prayers in the same Æschylus. Christ in the above-mention'd Passages opposes this Error. And Tertullian informs us, that the ancient Christians used to swear by the Life of their Prince, a thing more august and venerable than any Genius whatever. And in Vegetius we find a certain Form, which we took Notice of before, wherein the Christian Soldiers swore, not only by God, but by the Majesty of the Emperor, which next to God, is what ought to be Valued and Reverenced by all Mankind.

XII. Nay more, (e) if any one swears by False Gods, his Oath shall bind him, because, tho' under a False Expression, yet in that general Idea he has the Deity in View; and therefore the True God, if he be forsworn, looks upon it, as done in Contempt to him. And though we see indeed that the holy Men of Antiquity have never propos'd an Oath in that Form, much less have taken it themselves, which I admire that Duarenus should allowed; yet, if they could not prevail with those they had Business with, to swear otherwise, they however dealt with 'em, they for their Parts swear-

XII. It is an Oath, tho' sworn by false Gods.

VOL. II.

X

ing

(e) If any one swears by False Gods, his Oath shall bind him.] Wisdom ch. xiv. εἰ γὰρ ἢ ἡ δύναμις ὁρᾷ τὸν δόλον, ἀλλ' ἢ ἡ ἀμαρτανότων δίκη ἐκτελεῖται, αἱ δὲ ἡ ἀδίκητος παρὰ πάντων. Which the Latin Translator turns thus: Non enim Juratorum virtus, sed Peccantium pena perambulat semper Injustorum prævicationem. It is not the Power of them they swear by, but the Vengeance which constantly pursues Sinners, that always haunts and attends the Frauds and Collusion of the Unjust and Perjur'd.

ing as they ought, and receiving from them such an Oath as they could get. We have an Instance of this in *Jacob and Laban*, Gen. xxxi. 53. (f) This is what *St. Austin* says, *Even he who swears, but by a Stone, if he swears falsely, is perjured; And then, The Stone does not bear you speak, but God punishes you for your Deceit.*

XIII. The Effects of an Oath; whence arises a twofold Obligation, one at the time of swearing, the other after; this distinctly explained.

XIII. 1. The Principal Effect of an Oath, is to end all Disputes, *πάσης ἀντιλογίας τέλος εἰς βεβαίωσιν ὁ ὅρκος*, says the Divine Author to the Hebrews; *An Oath for Confirmation is the end of all Strife.* Not unlike is that of *Philo*, *ὅρκος μαρτυρία θεῶν πρὸς γὰρ ἀμφισβητημάτων*, *An Oath is the Testimony of God, in doubtful Cases.* And that of *Halicarnassensis*, *τελευταία ἡ πίστις ἀπασιν ἔστιν &c.* (g) *The utmost Assurance, that either Greeks or Barbarians can give, and which no Time can efface, is when by their Oaths and Vows they make the Gods the Sureties of their Contracts and Agreements.* So was an Oath among the *Egyptians*, *μεγίστην παρ' ἀνθρώποις πίστις*, *The greatest Pledge of Human Fidelity.*

2. He then who swears is oblig'd to two Things. First, That his Heart agree with his Words, which *Chrysippus* terms, *ἀληθορκεῖν*, to swear truly. Secondly, that his Actions answer his Words, which he calls, *εὐορκεῖν*, to swear well, he who offends in the former Case is said, (h) *Ψευδορκεῖν*, to swear Falsely; he who in the latter, *ἐμορκεῖν*, to be perjured,

(f) This is what *St. Austin* says.] Sermon. xxviii. de verbis Apostoli; 'tis quoted, c. Ecce dico: Claus. xxii. quæst. v.

(g) The utmost Assurance.] *ὅρκος ὁ ᾧ ἐν ἀνθρώποις &c.* An Oath, which is look'd upon by all Mankind to be the last and strongest Pledge of mutual Faith and Veracity.

(h) *Ψευδορκεῖν*.] This False swearing is forbidden, *Exod. xx.* And the Perjury, *Levit. xix.* As the Hebrews assert, *præcep. jubens. ccl.*

jured, as the same *Chrysippus* nicely distinguishes them, though sometimes they are confounded.

XIV. And indeed if the *Matter* be such, and the words so conceived, that they regard not only God, but the *Person* too we are engaging with, that Person no doubt of it shall from that Oath be entitled to a Right, as much as by any Promise or Contract, which ought to be taken in the most simple and plainest Sense. But if the words of the Oath do not regard that Person, by conferring any Right on him; or if they do respect him, yet so as that somewhat may be oppos'd to his *Claim*, then the Force of the Oath will be such, that that Person shall acquire no Right, but that the Swearer shall nevertheless be obliged before God to make good his Oath. (i) We have an Instance of this in him, who by an unjust Fear has extorted a *Promise* upon Oath. For he obtains no Right, or at least such a one only, as he is obliged to give up, because he was the occasion of the *Damage*; thus we read, that the *Hebrew Kings* were both (k) reprov'd by the *Prophets*, and punish'd by God, for breaking their Faith, which they had sworn to the *Kings of Babylon* to maintain inviolable. *Cicero* commends *Pomponius* the *Tribune* for keeping his Word and Promise, though what he swore was forced from him by the *Fright* they put him into; so great, says he, was the Reverence of an Oath in those Days. And therefore not only *Regulus*, how unjust soever his Confinement was, was oblig'd to render himself a *Prisoner*; but also those *Ten* that *Cicero* men-

XIV.
When an
Oath lays
us under an
Obligation,
both to God
and Man,
and when
to God only.

X 2

tions,

(i) We have an Instance of this in him, who by an unjust Fear has extorted a Promise upon Oath. St. *Austin* in his ccxxivth and ccxxvth Epistles tells us, that an Oath, tho' we were drawn into it by Force, ought in Reverence to God to be kept.

(k) Reprov'd by the Prophets. See too *Jerem.* xxix. 7.

XV. The
Opinion
that an
Oath given
to a Pyrate
or Tyrant,
binds not
before God,
confuted.

tions, were oblig'd too to return to *Hannibal*, for this was what their *Oath* had laid upon 'em.

XV. 1. Nor is this only practis'd in relation to public Enemies, but in any Case whatever; for it is not so much the *Persons* to whom we swear, (1) as *God* whom we invoke as a *Witness* to what we swear, that creates this *Obligation*. And therefore *Cicero* is not to be minded, when he says, that it is no *Perjury*, if a Man does not pay the Money which he promised to *Pyrates* or *Robbers* for saving his Life; because a *Pyrate* or *Robber* has no Claim to the Right of *Arms*, but is a common Foe to all Mankind, and with whom we ought not to keep either our Word or our *Oath*. And the same in some other Place he says of a *Tyrant*, as *Brutus* does in *Appian*, ὅς τις ὅτι Ῥωμαῖοις μέγας τοῦτον ὅς ἐπαρῶν, the Romans think it no Point of Honour or Duty to observe either Faith or Oath to Tyrants.

2. But tho' by the Law of Nations there is a great Difference between an *Enemy* and a *Pyrate*, as we shall shew hereafter, yet will not that Difference be of any Weight in this Case, where we have to do with *God*, and not with *Man*; for tho' (m) the Condition of the Person be such as he cannot claim a *Right*, yet that signifies nothing, since 'twas *God* we are engaged to, and therefore an *Oath* is called a *Vow*; nor is what *Cicero* says allowable, that there is no Common Laws that hold good with a *Rogue*. For by the

(1) As God whom we invoke as a Witness.] Gregoras, εἰς θεὸν ἢ ἐμπορία τὸ ἡ περὶ θεοσέπειας ἀνατίθηναι ἔγκλημα. Perjury Charges God with Negligence.

(m) Though the Condition of the Person be such, that he cannot claim a Right.] Plutarch in his *Lysander*; ὁ ὅρα παρακρούμενος &c. He who deceives his Enemy by an Oath, confesses that he fears him, but despises God.

the Law of Nations whatsoever is deposited with us by a Thief (n) is to be restored to him, if the right Owner does not appear, as Tryphoninus well observes.

3. Wherefore I cannot approve of their Opinion, who think it Discharge enough, if a Person does but barely lay down the Sum, which he has promised to pay a Robber, tho' he immediately takes it back again; because when we swear to God, our Words ought to be understood in the plainest Sense and to intend a Performance. And therefore he who came back to his Enemy privately, and then went off again, did not in the Judgment of the Roman Senate satisfy his Oath of Returning.

XVI. 1. As to that of Accius, T. Fregisti fidem.

A. Quam neque dedi, neque do infideli cuiquam; T. You have broke your Faith. A. Which I neither gave, or ever do give to a Person who has none himself; may in this Sense be allow'd, if our Promise made, and confirmed by Oath, (o) was grounded upon another's Promise, as upon a Condition to which ours related; for that Condition not being perform'd, makes void our Promise. But if the Promises were of several kinds, and did not respect each other, then each Promise is to be faithfully discharg'd by the Persons who swore; and hence it is, that Silius commending Regulus, addresses himself to him in the following Terms:

Who to long Ages in the Records of Fame,
Shall stand a Bright Instance of nicest Honour
To False Carthaginians kept.

X 3

2. A

(n) Is to be restor'd to him.] And to an Usurper too, as the Bienenus did to Orofernes. Polybius and Diodorus Siculus in Excerpt, Peires.

(o) Was grounded upon another's Promise.] C. pervenit. iii. de jurejurando. Add L, lege fundo, in fine D. de lege commissoria.

XVI. Whether an Oath given to one who does not regard his own Word be to be kept; explain'd by a Distinction.

2. A plain *Inequality* in Contracts naturally gives sufficient Cause, either to *repeal* or *reform* them, as I have said before. And though the Law of *Nations* has made some Alteration in it, yet by the *Civil Law*, which is of Force where both Parties are of the same Nation, they often have recourse to what is allowed by the Law of *Nature*, as we have also proved elsewhere. But here too, if an *Oath* intervene, though little or nothing be due to the other, yet our Faith given to God must be punctually observ'd. And therefore the *Psalmist* reckoning up the Qualities of a good Man, adds this as one of 'em, *He that sweareth to his Neighbour, and disappointeth him not, though it were to his own Hindrance.*

XVII. He who is bound to God alone does not oblige his Heir after him.

XVII. But it is to be observ'd, that where there is no *Right* transferred to the Person with whom we deal, on the Account of some defect, as aforesaid, but we are engag'd only in respect of the *Oath* that we made to God, there the Heir of him who made the *Oath* is not bound. For as the *Goods* of the deceased pass to the *Heir*, so do also the *Charges* and *Incumbrances*, but not any other Obligations, which were only the Result of meer *Piety*, *Gratitude* or *Honour*. For these have nothing to do with what is strictly term'd *Right*, as it's now establish'd, as we did not forget to acquaint you somewhere else.

XVIII. It is no Perjury not to keep one's Word or Oath to him, who does not desire that it should be kept; or if that Quality or Circumstance of Condition, under which, and in Consideration of which the Oath was made, ceases.

XVIII. But even where there arises no *Right* to the Person who receives it, yet if the *Oath* seems to respect the Advantage of a *third* Person, and (p) that Person will not accept thereof, the *Oath* shall not oblige him who gave it; (q) nor if

(p) And that Person will not accept thereof.] Plautus in his *Ruden*, I beg that you would do me the Favour to accept my *Oath*.

(q) Nor if the Quality of the Person ceases.] See to the same Purpose

if the *Quality* of the Person ceases, in regard to which a Man swore; as if a *Magistrate* shall cease to be a *Magistrate*, the Obligation ceases. In *Cæsar's Commentaries*, *Curio* rightly informs *Domitius's* Soldiers, *How is it possible, that you should be bound by an Oath to him, who having thrown away the Ensigns of Majesty, and renounced his Command, is become a private Man, and a Prisoner under another's Power?* and presently he adds, the Oath has lost its obliging Force, by the loss of the *Imposer's* Power.

XIX. 'Tis an Inquiry too, whether an Act done contrary to an Oath, be only *unlawful*, or *void*? Where we must distinguish that if our *Faith* only be engaged, the Act done contrary to our Oath shall stand good, as in a *Testament* or *Sale*. But the *Oath* shall not be of Force, if it be so framed, that it comprehends an absolute renouncing of any Power to do that Act. And these Things do naturally attend any Oath; whence we may easily judge of the Oaths of *Kings* and of *Foreigners* to one another, when the Act is not subject to the *Law* of the *Place*.

XX. (r) Let us now see, what Power and Authority, *Superiors*, that is, *Kings, Fathers, Masters, and Husbands* as to what regards a Conjugal State, are intitled to. And here the Act of our *Superiors* cannot make void an *Oath*, which is truly Obligatory, so that it should not be fulfilled; for that belongs both to *Natural* and *Divine* Right. But because all our Actions are not fully in our own Power, but they have some Dependence on our *Superiors*, therefore we allow our *Superiors* to have a double Power over us concerning that

XX. How far the Prince's Power extends concerning what his Subjects have sworn to Strangers, or Strangers to them, explained by a Distinction,

X 4

which

pose in *L. Si unus*, §. *Centium*, *D. de Excusat. tut.* and in *Gail. ii. obs. cxliv. n. 8.* and *de Arrestis*, x. 9. and in *Azorius's Moral Institutions* v. 22. q. 6. part. 1.

(r) Let us now see, what Power and Authority *Superiors*, that is, *Kings, Fathers, Masters, and Husbands* as to what regards a Conjugal State, are entitl'd to,] *St. Austin*, *Epist. ccxi* and *ccxli*.

which is sworn, the one directly over the Person swearing, the other over the Person to whom he Swears.

2. The Act of the *Superior* may restrain the Person swearing, either *before* he Swears, by making such an Oath void, as far as the Right of an *Inferior* is subject to the Power of a *Superior*, or *after* he has sworn, by forbidding the Performance of it. For an *Inferior*, as such, could not bind himself without the Consent of his *Superior*, beyond which he had no Power. After this manner, by the *Hebrew Law* the *Husband* had Power to make void the *Vow* of his *Wife*, the *Father* that of his *Children* so long as they were under the Power of his Government. *Seneca* proposes this Question, *What if there should be a Law made, that no Man should do, what I have promised my Friend to do for him?* Which he thus answers, *the same Law defends me, that forbids me.* But some Acts may be mixt and made up of both, as when the *Superior* orders, that what the *Inferior* shall swear in such and such Circumstances, as, suppose, through *Fear* or *want* of Judgment, shall be binding, only so far as he, the *Superior*, approves of it. And upon this Foundation are built the *Dispensations* and *Abolutions*, (s) which *Princes* in former Times did exercise by themselves, which Power they now voluntarily remit, that it may the more Religiously be executed by the *Ecclesiastical Jurisdiction*.

3. So the Act of a *Superior* may be directed against the Person to whom it is sworn, either by taking from him that *Right* which he has gained, or if he has no *Right*, by forbidding him to *claim* any *Right* by that *Oath*. And this may be done

two

(s) Which Princes in former Times did exercise.] Suetonius in his *Tiberius*, 25. And so it was in Spain for a great while, as is observ'd by *Ferdinand Vasquez*, de Success, creat. l. 11. Sect. 18.

two ways, either by way of *Punishment*, or for the *publick Good* by vertue of his *Sovereign Power*. And hence we may learn, what *Power Princes* have over the *Oaths* of their Subjects, where he who swears, and he to whom it is sworn, are of different Nations. But he who upon his Oath has promised any thing to an *injurious Person*, as to a *Pyrate*, as he is such; cannot by way of *Punishment* take away from him, that *Right* which he has given him by his *Promise*. For then Words would be *Insignificant*, which is a Circumstance that ought wholly to be avoided. And for the same Reason the *Right* of that which is *promised*, cannot be *recompensed* with the *Right* of that which was before disputed if the *Agreement* were made, after that *Dispute* began.

4. Yet may a *Human Law* take away that Clog and Impediment, which it self had laid upon some particular kind of Acts, if an *Oath* intervene either in *General Terms* or under some *certain* and *precise Form*; which the *Roman Laws* have done in such Impediments, as do not directly respect the *publick Advantage*, but the *private Benefit* of him who swears. And if this be so, the Act sworn shall be of Force in the same manner, as it naturally would be, if there were no such *Human Law*, either by obliging his *Faith* only, or by giving also a *Right* to another according to the different Nature of the Acts, which we have explained in another Place.

XXI. 1. We must observe here by the way, that what is said in the Precepts of *Christ*, and by *St. James*, of not *swearing at all*, does not belong properly to *Affirmative Oaths*, (†) of which we have some Instances in *St. Paul*, but to such as *Pro-*
mise

XXI. What manner of Oaths Christ forbid; when he prohibits swearing at all.

(†) Of which we have some Instances in *St. Paul*.] Rom. i. 9. ix. 1. 2 Cor. i. 23, xi. 31. Phil. i. 8. 1 Thess. ii. 10. 1 Tim. ii. 7.

mise something *Future* and *Uncertain*. This is plain from the *Opposition* in the very words of *Christ*, *Ye have heard it hath been said by them of old time, thou shalt not forswear thyself, but shalt perform unto the Lord thine Oath; but I say unto you, swear not at all; and by the Reason given by St. James*, *μη εἰς ὑπόκρισιν πεισθε*, that ye fall not into *Hypocrisie*, that is, *that ye be not found deceivers*; for so the word *ὑποκρισις*, signifies in the *Greek*, as appears *Job xxxiv. 30. Mat. xxiv. 51.* and in several other *Places*.

2. The same may be proved by our Saviour's words, *ἔγω γ' ὑμῶν ναι, ναι; ἔ, ἔ; Let your Communication be Yea, yea; Nay, nay; which St. James thus expounds*, *ἔγω γ' ὑμῶν τὸ ναι, ναι; καὶ τὸ ἔ, ἔ; Let your yea, be yea, and your nay, nay; where there's evidently the Figure which the Rhetoricians call* *πλοκή*, *a Repetition*; as in that *Passage*,

Ex illo Corydon, Corydon est tempore nobis.

From that time, Corydon was Corydon indeed.

And in another like it, *ad illum diem Memmius erat Memmius; to that Day Memmius was Memmius.* For the former, *yea* and *nay*, signifie a *Promise*, the latter the *fulfilling* of that *Promise*. For *ναι* or *yea* is a form us'd by a Person *promising*, and is explain'd, *Revel. i. 7.* by *Amen*, or *so be it*, and it is of the very same signification in the *Syriack*, *ܐܡܝܢ* answering to the *Rabbinical* *אמן*, as does the *Arabick* *آمين*.

As among the *Roman Lawyers* *malisa*, very well, and *Quidni*, why not? are Particles of Speech that denote the *Consent* of the Person to the *Agreement* that's propos'd to him. In *St. Paul 2 Cor. i. 20.* 'tis taken for the *Accomplishment* of a *Promise*, when he says, that *all the Promises of God in Christ*,

Christ, are *vai* καὶ ἀμὴν, *Yea* and *Amen*, that is, are certain and undoubted. And from hence arises that old way of Expression amongst the Jews, *Iusti Hominis, vai est vai* ἔσ non, *est non, an honest Man's yea is yea, and his no is no.*

3. On the contrary they whose *Words* and *Actions* disagree, are said to be, *vai* καὶ ἔ, *yea* and *nay*, 2 Cor. i. 18, 19. That is, their *yea* is *nay*, and their *nay* is *yea*. So St. Paul himself expounds it; for when he said he did not ἐλαφρῶα χρησάμενος, *use lightness*, he adds, his Word was not *vai* καὶ ἔ, *yea* and *nay*. Festus relating the several Significations of the Word *nauci*, writes thus: Some derive it from the Greek, (u) *vai* καὶ ἔχι, *Nai cai ouchi*, and say that it imports a *Fickle inconstant Creature*. Now if *vai* καὶ ἔ, *yea* and *nay*, signifies *Fickleness and Inconstancy*, it will follow that *vai, vai; ἔ, ἔ; yea, yea; and nay, nay;* signifie *Constancy*.

4. So that our Saviour's words imply, what (x) Philo the Jew expresses, Καλλίστον καὶ βιωφελέστατον καὶ ἀμωρότερον &c. *It is the best thing in the World, the most convenient, and most agreeable to a Rational Nature to abstain from swearing, and to accustom one self so to Truth, as that our Word may be taken as soon as an Oath.* (y) And in another Place; Ὅ τὰ ἀπαράλλακτον λόγον ὅριον ἔσω βέλαιος, ἀνδρὶν, ἀφώδιστα. *The word of a good Man ought to pass for a firm, unchangeable and sincere Oath; and as Josephus says of the Essenes, πᾶν τὸ ρηθὲν ὑπὸ αὐτῶν ἰσχυρώτερον ὅρκου, τὸ δὲ ὁμνυμένον αὐτοῖς περιττον, Every word spoken by them was firmer than an Oath, and therefore they looked upon an Oath as superfluous.*

5. (z) Py-

(u) *Nai καὶ ἔχι, Nai cai ouchi.*] You had better in this Passage of Festus write it *ouchi*, as 'tis often in Homer, for this comes nearer the Word *Naucis*.

(x) Philo.] De decaloga.

(y) And in another Place.] De specialibus legibus.

5. (2) *Pythagoras* seems to have borrow'd this Maxim from the *Essenes*, or some of their Followers, *μη ὁμνύειν θεῶς, ἀσχεῖν γὰρ αὐτὸν δαῖν ἀξιόπιστον παρῆχαι*, not to swear by the Gods, for every one should take care (a) to be believed without his Oath. *Curtius* tells us the *Scythians* thus address'd *Alexander*, Do not expect that the *Scythians* should oblige themselves to you by swearing, they take an Oath of Fidelity in always being as good as their word. And *Cicero* for *Roscius* the Comedian, Whatever Punishment the Immortal Gods have appointed for a perjured Person, the same is design'd by 'em for the Lyar and the Fraudulent; for they are not so much offended with Men, for their breaking their words upon Oath, as for their Treachery, and Perfidiousness, whereby they intend to Cheat and Circumvent others. Remarkable is the Saying of *Solon*, καλοκαγαθίαν ὅρκος πισοτέρων ἔχει, Be

(x) *Pythagoras*.] For *Hermippus* the *Pythagorean*, as *Origen* against *Celsus* asserts, said that *Pythagoras's* Philosophy was deriv'd from the *Jews*. And both *Josephus*, and *Jamblichus* the *Pythagorean* have ascrib'd it to the *Hebrews*.

(a) To be believ'd without his Oath.] *Philo*, ἡδὴ γὰρ ὅγε ὁμνύς &c. For he who is put to his Oath is suspected of being False to his Word. In *Sophocles's* *Oedip. Colon*; *Oedipus* has express'd himself thus:

Οὐτοί σ' ὕψ' ὅρκου γ' ὡς κακὸν πισώσονται

I won't require your Oath, as I would a Rascal's.

Ithicus replies,

Οὐκ ἐγὼ γὰρ ἂν ἐδέν ἢ λόγῳ φέρεται,

Nor if you did, would you've more, than upon my Word I'd do.

M. Antonin in his Description of a Good Man: μήτε ὅρκου δεόμενος, one who has no occasion to swear. *St. Chrysostom* de Statuis. xv. εἰ μὲν πιστεύεις &c. If you believe that he is an honest Fellow, don't lay him under the Necessity of an Oath; and if you know he's a Rogue, don't force him to be perjur'd.

Be of that probity, as to be believed more for your Honesty than your Oath. And Clemens Alexandrinus says, that 'tis the Duty of a Good Man, τὸ πιστὸν τῇ δημολογίᾳ ἐν ἀμεταπώτῳ καὶ ἐδραίῳ δεικνύειν βίῳ καὶ λόγῳ, To shew the Sincerity of his Promises in the Firmness and Uniformity of his Life and Conversation; and Alexis the Comedian,

Ὅρκος βέλτερός ἐστιν ἂν νέυσω μόνον,

If I do but Nod it's as good as any Oath.

And Cicero in his Oration for L. Cornelius Balbus tells us, that, when one at Athens, who had led an Holy and Irreproachable Life, had given in his publick Evidence, and was coming to the Altar to confirm it upon his Oath, all the Judges Unanimously cry'd out, that he should not Swear; because they would not have it thought that his Integrity was owing more to Religion, than to his innate Value for Truth.

6. That Passage of Hierocles upon the Golden Poem, does not disagree with what our Saviour advances, ὁ σέβει ὅρκον ἐν ἀρχῇ παραγγέλλας &c. He who in the beginning commanded us to Reverence an Oath, did therein forbid us to swear about Things (b) that are only expected, and altogether uncertain in their Event and Issue. For such Things are Trifling and Hazardous,

(c) That are only expected, and altogether uncertain in their Events and Issue.] St. Chrysostom very well animadverts upon this in his xiith de Statuis; ὅτι καὶ μὴ συναρπαδῆς μὲν ἐν &c. Tho' you did it without Compulsion, Voluntarily and knowingly, yet sometimes from the very Nature of the Thing will you be forced with your Consent and Knowledge to forswear your self. And presently after, σφαλερὸν μὲν ἐν &c. 'Tis Dangerous for a Man even to swear to what relates to himself. For in that Case too we are often impos'd on by the Vicissitude and Incertainty of Things.

zardous, and therefore 'tis neither for our Honour, nor our Safety, to swear about them at all. And Libanius highly commends a Christian Emperor, because ἐμπορίας τοῦτον ἀποσταῶν, ὥς &c. he was so far from Perjury; that he dreaded even to swear the Truth. And Eustathius upon that of the xivth Odys, ἀλλ' ἦτοι ὄρκον μὴ ἰάσομαι, but we will allow an Oath, says thus, εἰ χρεία ὄρκου ἐν τοῖς ἀσκήλοις &c. in doubtful Matters there is no occasion for an Oath by way of Confirmation, but of Prayers for Success.

XXII.

What Circumstances have by Custom, without swearing the Force and Obligation of an Oath.

XXII. And therefore in many Places instead of an Oath, it is Customary (c) to ratifie a Promise by joyning of the two Right Hands together, which was τῶν δύο βραχίων ἀπὸ τοῖς Πέρσαις, the most obliging Bond among the Persians; or by some other Sign and Circumstance, and was so powerful an Engagement, that if the Promiser did not faithfully perform what he had promised, he was no less detested, than if he had really been perjured. And it us'd to be particularly said of Kings and Great Persons, that their Word was as Good as an Oath. For they ought to be such, as to be able to say with Augustus, Bonæ fidei sum, (d) I am

(c) To ratifie a Promise by joining of the two Right Hands together.] This is mention'd by Eustathius upon the xxivth Odys. Aristophanes's Scholiast, ad Nubes; Diodorus Siculus, l. viii. Crantz. Saxon, xi. 27. In c. Ad Aures de his quæ vi metusve aquantur Jura-mentum & fides interposita.

(d) I am a Man of my Word.] Isocrates speaking of Evagoras King of Salamis; ὁμοίως τὰς &c. He kept his Word and Promise, as Religiously as his Oaths; Symmachus, x. 19. Nothing is more to be depended on, than what Princes engage for. And Nicetas of Alexius, Brother of Isaac. l. iii. βασιλεῦσι παρὰ πάντων &c. Kings ought above any other Consideration to have the greatest Regard to the Punctual Discharge of their Oaths. Cicero for Cornelius Balbus, They say at Athens, that when one of their People, who had always led a very Religious and sober Life, had given in his publick Evidence,

am a Man of my Word; and with Eumenes, that they would sooner lose their Lives, than be worse than their Word. And very pertinent to this is that of Guntherine the Genoese.

*Nudo jus, & reverentia verbo
Regis inesse solet, quovis juramine major.*

*No solemn Oath affords more sacred Ties
Than does a Prince's Word.*

And Cicero in his Oration for Dejotarus says in Commendation of C. Caesar, that his Hand was not more to be depended on in War and Battle, than in what he had promis'd by it. And 'tis observ'd by Aristotle, that in the Heroes Days, if a King did but lift up his Scepter 'twas as good as his Oath.

and (as 'tis a Custom among the Greeks) was coming to the Altar to confirm it upon his Oath, all the Judges unanimously cry'd out that he should not swear.

CHAP.

C H A P. XIV.

Of the Promises, Contracts, and Oaths of those who have the Sovereign Power.

I. The Opinion of those refused, who hold that Restitutions to the full, which arise from the Civil Law, extend to the Acts of Kings as such; as also that Kings are not obliged by their own Oaths.

I. 1. **T**HE Promises, Contracts, and Oaths of Kings, and of others who have a like Sovereign Power, have some peculiar Difficulties and Questions, as well concerning the Power which they have over their own Acts, as that over their Subjects and over their Successors. As to the first, the Query is, whether the King himself has Power to restore himself to the State he was in before, or to make void his own Contracts, or to absolve himself from his Oath, as in all these cases he can his Subjects. Bodine thinks that where a King is over-reached by Fraud, by Mistake, or by Fear, he may for the same Reasons be restored to his own Rights, and this both in things that affect and lessen his Royal Prerogatives, and in those that relate to his private Fortune, as any of his Subjects might to theirs. To which he adds, that a King is not obliged by his Oath, if the Contracts agreed on be such, as may be revoked by the Civil Law, tho' the Contracts be agreeable to Honesty; and that he is not therefore bound, because he has Sworn, but as any Man may be bound by just Covenants so far as another is concerned in them.

2. But we (as we have elsewhere distinguished) do here also distinguish between the Acts of Kings which they do as Kings, and the private Acts of those Kings. For what they do as Kings, is looked as done by the Consent of the whole Nation. But as the Laws made by the whole Body of the People, could have no Power over such Acts, because the Community is not superior to it self; so neither can the

the Laws of a *King*. Wherefore *Restitution*, which receives its Power only from the *Civil Law*, is of no force against such *Contracts*. And therefore neither are those *Contracts* to be excepted, which *Kings* make in their *Minority*.

II. 1. If the *People* indeed have made a *King*, not with an *Absolute Power*, but with the *Restraint* of some *Laws*, then what *Acts* he does contrary to those *Laws*, may be made void by those *Laws*, either *entirely*, or in *part*, because so far the *People* have reserved a *Right* to themselves. But if the *King* has a *real* and *absolute* *Sovereignty*, and yet holds not his *Kingdom* as his *Property*, that is, has no *Power* to *alienate* it, or any *part* of it, or of its *Revenues*, all such *Acts* of his that shall tend to an *Alienation*, are void by the *Law of Nature*, because they relate to what is not his *own*, as we have proved already.

II. To what Acts of Kings the Laws extend, explained by several distinctions.

2. But the *private Acts* of a *King* are to be considered, not as the *Acts* of the *Community*, but as of a single *Party*, and therefore done with a design to follow the common *Rule* of the *Laws*; whence it is, that even the *Laws* which make void some *Acts* either *simply*, or if the *injured Person* desires, shall also take place here, as if it had been agreed on upon this *Condition*. Thus we see some *Kings*, who have consulted the *Laws* for *Remedies* against *Extortion*. Yet a *King* may, if he pleases, *exempt* from those *Laws* his own *Acts*, and also those of other *Men*; but whether he *will* do so, must be gathered from *Circumstances*. If he do so, then the case shall be determined by the mere *Law of Nature*: Provided, where the *Laws* make void any *private Act*, not in *favour* of the *Actor*, but as his *Punishment*, those are of no force against the *Acts* of *Kings*, nor any other *penal Laws*, nor any *thing* whatever that carries a

Constraint along with it. For to *Punish* and to *Force* must proceed from *distinct* Persons. Neither can the *Compeller* and the *Compelled* be one Person, tho' under divers Respects.

III. When a King is obliged by his Oath, and when not.

III. But a King may, by a *preceding* Act, make void his *Oath* as a *private* Man, if by a *former* Oath he has deprived himself of the Power to take such an Oath; but by any *after* Act he cannot, because here also is required a *distinction* of Persons. For those which are made void by an *after* Act, had before in them this Exception, *unless my Superior will not let me*; which cannot be in the Oath of a King: And to swear that you shall be oblig'd to stand to what you promise, *unless you will your self*, is very absurd, and contrary to the *nature* of an Oath. For tho' an Oath can confer no Right on another, by reason of some Fault in that Person, yet he who swears, is bound before God, as I said before; and thus are Kings also obliged by their Oaths, no less than *private* Men, tho' *Bodine* be of another Opinion.

IV. How far a King is obliged to what he has promised without any Cause or Reason.

IV. We have also shewed already, that full and absolute *Promises* being *accepted*, do naturally transfer a *Right* to another, which respects Kings equally with *private* Men. And therefore their Opinion is to be condemned, who say that Kings are not bound by the *Promises* which they have made without any Cause or Reason for so doing; which yet may be true in some Sense, as we shall see hereafter.

V. The use of what has been said of the force of the Laws about the Contracts of Kings.

V. As to what we have said before, that the *Civil* Laws of a Kingdom have no Power over the *Agreements* and *Contracts* of Kings, 'tis no more than what *Vasquez* has observ'd. But his Inferences from thence, that his *buying* and *selling* at no certain Price, his *letting* or *hiring* without any *Rent* agreed on, or giving away any thing in *Fee* with-

without a *Writing* or *Grant* under his *Hand*, shall be valid, I cannot allow. For these *Acts* are done by him not as a *King*, but as any other *private Person*. And over such *Acts* as these not only the *Civil Laws* of the *Nation*, but even the *Municipal Laws* of the *City*, where the *King* resides, have Power. Because the *King*, for some special Reason, seats himself there as a *Member* of that *Corporation*. And this is the case, unless (as I said before) it shall appear by good Circumstances, that it was his Will, that his *Actions* should be exempted from the Power of those *Laws*. But the other Example brought by *Vasquez*, concerning a Promise any way made, is very well grounded, and may be explained by what has been said above.

VI. 1. What the *Civilians* generally maintain, that the *Covenants* which a *King* enters into with his *Subjects*, oblige by the *Law of Nature* only, and not by the *Civil Law*, is a little obscure. For *Authors* sometimes abuse the Term of *natural Obligation*, by interpreting it to be what is *naturally* fair and honest, but not what is properly and strictly *due*. As for an *Executor* to pay entire *Legacies*, without deducting, as 'twas by the *Falcidian Law* allow'd, a *fourth* part, or to pay a just *Debt*, when the *Creditor* is incapacitated by the *Law* to receive it, or to *return* a *Kindness*, none of which can be recover'd by an *Action of false Debt*. But sometimes indeed they construe it more properly to be what does really *oblige* us, whether it transfer a *Right* to another, as in *Contracts*; or transfers *none*, as in a *full and firm Promise*. *Maimonides* the Jew, *Duc. Dubit. l. 3. c. 54.* makes an apt Distinction between these three, he says that whatsoever comes *more* than is *due*, falls under the Notion of *WON Mercy*, which other Interpreters

VI. In what Sense a King may be said to be obliged to his Subjects by the Law of Nature only or by the Civil Law too.

upon Prov. xx. 28. call it the *Excess or Overplus of Goodness*; that what is due in strictness of Law, is call'd in *Hebrew* *Justice*, and that they stile what proceeds from a Principle of Honesty, *Justice*, that is *Equity*. The *Expositor* upon Matt. xxiii. 23. terms it *Wise*, where by the word *Wise* he means what the *Hellenists* generally call *δικαιοσύνη*, *righteousness*. For *Wise* signifies what is *strictly due*, as you'll find in *1 Mac. i. 18.* and *32.*

2. A Man may also be said to be *civilly* obliged by his own Act, either in this Sense, that the *Obligation* arise not from the mere *Right* of *Nature*, but from a *Civil Right*, or from both. Or in this Sense, that an *Action* in the *Civil Law* may lie against him. We therefore say, that from the *Promises* and *Covenants*, which a *King* makes with his Subjects, there may arise such a true and proper *Obligation*, as may confer a *Right* upon them; for such is the Nature of *Promises* and *Contracts*, even between *God* and *Man*, as we have shew'd already. But if the Acts of a *King* be such as may be done by any other Person, the *Civil Laws* shall oblige him. But if they be done by him, as a *King*, the *Civil Laws* do not affect him; which difference was not well observed by *Vasquez*. Nevertheless an *Action* may arise from any of these Acts, so far as to declare the *Rights* of the *Creditor*, but no *Compulsion* can follow on account of the Condition of the Persons we are dealing with. For that Subjects should force him, to whom they

(2) The Excess or Overplus of Goodness. [Hitherto belongs what is] *Bona* upon (or other View or Account, but only the mere Exercise of our *Liberality* and *Munificence*, as the Law expresses it, *1. D. de donationibus. 2. consensu ex nymis. 3. adiac. d. 1. 1. 2. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100.* *Generosity* flows from the rich Fountain of *Good Nature*. *Phaedrus* in his *Cato Major*.

are *subject*, is not lawful, which *Equals* may do against *Equals* by the *Right of Nature*, and *Superiors* against *Inferiors* by the *Civil Law*.

VII. But we must also observe this, that a *King* may two ways *deprive* his *Subjects* of their *Right*, either by way of *Punishment*, or by virtue of his *Sovereign Power*. But if he do it the last way, it must be for some *publick Advantage*, and then the *Subject* ought to receive, if possible, a just *Satisfaction* for the *Loss* he suffers, out of the *Common Stock*. This therefore, as it holds in other things, so it does also in that *Right* which is obtained by *Promise* or *Contract*.

VII. How a *Right* gained by *Subjects* may lawfully be taken away.

VIII. Nor must we by any means allow that *Distinction*, which some make, of the *Right* acquired by the *Law of Nature*, and that by the *Civil Law*. For the *King* has an equal *Right* to both, nor can either of them be taken away without *Consent*. For it is contrary to *Natural Right*, that whatever *Property* or other *Right* a *Man* has lawfully gained to himself, should be taken from him without a just *Reason*. On the contrary, if a *King* should do it, he is without doubt obliged to make *Restitution*, and to repair the *Damage*; because he acts against the true *Right* of his *Subjects*. And here is the difference between the *Right* of *Subjects*, and the *Right* of *Foreigners*, (that is, of such as are in no respect *Subjects*) which *Right* of *Foreigners* can by no means be under that *Sovereign Dominion*; for as to the *Penalty* in such cases, we shall see about that *below*; but the *Right* of *Subjects* must be under that *Dominion*, as long as the *Advantage* of the *Publick* wants and requires it.

VIII. The distinction of things gained by the *Law of Nature* and by the *Civil Law*, rejected.

IX. From what has been said we may perceive, how false the *Opinion* of some is, who hold all the *Contracts* of *Kings* to be *Laws*. For from the *Laws* there arises no *Right* to any *Man* against the

IX. Whether the *Contracts* of *Kings* are *Laws*, and when they are so.

King: And therefore if he should repeal those *Laws*, he *wrongs* no Man. However, if he does it without any *just Cause*, he is really to *blame*; but a Man may *claim a Right* from *Promises* and *Contracts*. For by *Contracts* the *Contractors* only are obliged, but by the *Laws* all *Subjects* are. But there may be a *Mixture*, partly of *Contracts*, partly of *Laws*, as a *Contract* made with a *neighbouring King*, or with the *Farmer* of the *Revenues*, which is at the same time publish'd for a *Law*, so far as it contains in it what is to be *observed* by his *Subjects*.

X. How
by the Con-
tracts of
Kings they
who inherit
all their
Goods stand
obliged.

X. (b) Let us now come to the *Successors*; and here we must *distinguish* between those who inherit *all the Goods* of the *deceased King*, as he who receives a *Patrimonial Kingdom*, either by *Will*, or from an *Intestate*; and between those who *succeed* in the *Kingdom* only, as by a new *Election*, or by *Prescript*, and that either in *Imitation* of other *vulgar Inheritances*, or *otherwise*; or whether *succeeding* by a *mixt Right*. For they who inherit *all the Goods* with the *Kingdom*, are without doubt obliged to perform all the *Contracts* and *Promises* of the *late King*. And that the *Goods* of the *Deceased* shall be *obliged* for all his *personal Debts*, is as ancient as *Property* it-self.

XI. How by
those Con-
tracts they
who succeed
in the King-
dom may be
obliged.

XI. 1. But how far they (c) who *succeed* barely to the *Crown*, or to the *Goods* only in *part*, and to the *Crown* entirely, are obliged, (by the *Contracts* of the *Predecessor*) does deserve as much to be inquired into, as it has been hitherto treated of without order. (d) 'Tis plain enough that such

(b) Let us now come to the *Successors*.] See the Authors used by Reinkingius. l. 1. claf. 3. c. 19.

(c) Who succeed barely to the *Crown*.] See Aymonius published by Freher. P. 373.

(d) 'Tis plain enough, that such sort of *Successors*, as such, are not directly, that is, immediately oblig'd. Thus Salomon was not obliged by the *Promise* which David had made to Shimei.

such sort of Successors, as such, are not directly, that is, *immediately* obliged; because what Title they have, they receive from the People, and not from him; whether that Succession fall like other common Inheritances, to the nearest or to the most remote, of which difference we have treated before.

2. But *immediately*, that is, (e) on the account of the State, the Successors too are obliged; which must be thus understood. Every Society, as well as every particular Person, has a Power to oblige it self, either by it self, or by its major part. This Right they may transfer, either expressly, or by necessary Consequence, by transferring, for instance, the Empire: For in Morals, he who gives the End, gives all things that conduce to the End.

XII. 1. But this is not without its Bounds and Limitations, nor indeed is the infinite power of obliging absolutely necessary to the good Government of a Nation, no more than it is to the Advantage of a Trust; but only as far as the Nature of that Power requires. (f) A Guardian, says Julian, is in the stead of, and ought to be respected as the Master of the Family, as long as he manages Affairs discreet-

Y 4

(e) On the Account of the State.] See several things to this purpose, c. 1. de solutionibus. It comes nearer to the matter in hand, what is mentioned c. Abb. de Sententiis & re judicata; where there are these remarkable Words, When both what the above-said Grandfather had given, and the above-mentioned Places that were purchased became liable to the Debts of the Crown. See too Brul. part. 1. desp. 6. thef. 7. Syr. de pace religionis Concl. 19.

(f) A Guardian, says Julian, is in the stead of, and ought to be respected as the Master of the Family, as long as he manages Affairs discreetly, but not when he robs his Ward.] Agreeable to this is what Camden has, Part 4. of his Queen Elizabeth in the Year 1595, and what Cromerus has about the Debts of George King of Bohemia imprudently undertaken by Wladislaw, l. 27.

ly, but not when he robs his Ward. In which Sense that of *Ulpian* is to be understood, Every Society shall be obliged by the Acts of the Governor, whether the Agreement be Advantageous, or Prejudicial to the Society. Nor is he who manages the public Affairs, to be strictly confined to this Rule (as some maintain) so that his Act shall then only be esteemed ratified, when the State receives a Benefit by it, for it would be very dangerous to the State it self, to reduce the Prince to such Necessities. Nor is it probable, when the People conferred the Government upon him, that they designed to straiten him thus. But what the Roman Emperors declar'd in Favour of their State, that what was transacted by the Magistrates, should be of force in doubtful Cases, and not so when that which is plainly due is rashly given away; the same Answer may be returned to our Inquiry, concerning the whole Body of the People, observing a proportion accordingly.

2. As then every Law does not oblige Subjects; for besides those which enjoin things unlawful, (g) some Laws are manifestly absurd and foolish; so also the Contracts of Princes do oblige their Subjects, if they carry any warrantable Reason, which in doubtful Matters (h) ought to be presumed,

(g) Some Laws are manifestly absurd and foolish.] As the Law of *Cabades* King of *Persia* in *Procopius* and *Agathias*. The Subject of this Law is apply'd to *Athenians* by *Petrius* the Ambassador of *Justin*, the Second to *Chosroes*, speaking of some things which *Justinian* seem'd to have promised the *Saracens*, &c. For no State, I think ought ever to be condemned for the Humour and Custom of one Man; no, nor on the Account of some Insignificant Law, tho' it were the King himself who abetteth that Humour and Custom, and enacted that Law.

(h) Which in doubtful Matters ought to be presumed in Respect to the Authority of Governors.] *Sidonius* l. 2. Epist. 2. *Agathias* l. 1. *Procopius* l. 1. *Justinian* has engag'd for, his State is oblig'd to discharge. See *Agathias* in his

in Respect to the Authority of Governors :
 - Which Distinction is much better than that which
 - is usually alledg'd by the Generality, about the
 - greater or less Damage that may ensue. For in this
 - Case we are not so much to regard the Success of
 - the Contracts, as the Reasons whereon they were
 - grounded, which if warrantable, the People shall
 - be oblig'd by them, if by any accident they are
 - ever free, and so shall their Successors too as the
 - Heads of the People; for if the Free People have
 - made any Contract, he also who comes after-
 - wards to possess this Kingdom in a full and abso-
 - lute manner, shall be oblig'd to stand to it.

3. (i) The Emperor Titus is much commended
 for this, that he would not suffer himself to be
 importuned,

concerning the whole Body of the People. Obli-
 his Praises of Theodosius; Symmachus l. 4. Epist. 7. and 19. p. 37.
 Conc. Teles. 5. c. 6. C. ceterum de donationibus. Corippus, l. 11. says,
 that Justinian's Debts, who had left a great deal of Money unsatisfied
 behind him, were paid by Justin, who succeeded him in the Em-
 pire.

(i) The Emperor Titus is much commended for this. The Story is
 in Suetonius, c. 8. in Xiphilinus out of Dion, and in Victor. You
 have something like it, c. Justinia. Cauf. 25. quæst. 1. Gall. obs. 11.
 66. 15. See also Rodericus's History. Gunderus Ligarinus, l. 5.

Neve secuturi factum subvertore Reges

Aus revocare queant, &c.

Nor can the following Kings subvert the Deed,
 Or ever reverse it, he has left the Duke All safe
 Sign'd with the Royal Seal

And l. 8.

Tanta famen clari sunt inaudientis Regis,
Or quædamque dona, &c.

So Great the Indulgence of the famous Prince

That whoever possess'd the Grants of former Kings,
 Did still enjoy 'em, could they fairly prove

By Authentic Writings the Goodness of their Claims.

importuned, to confirm any thing that his Predecessors had granted; whereas *Tiberius*, and his immediate Successors, no otherwise esteem'd the Grants of their Predecessors to be good, than as they themselves also had granted them to the same Persons. That excellent Emperor *Nerva*, in his Edict recorded by (k) *Pliny*, speaks thus, *Let no Man imagine that what he has obtained from another Prince, either privately or publicly, shall be by me revoked; that so if I confirm those Grants, he may be obliged to me more than to his Benefactor, for we want no new Addresses to congratulate our Accession.* But when on the other hand *Tacitus* had related of *Vitellius*, how he had torn the Empire in pieces, without any regard to Posterity; and that all the World flock'd about him to obtain his Extravagant Gifts, some with Money purchasing his Favour, he adds, *All wise Men looked upon those Grants as null and void, (l) which could neither be given, nor received, without the Danger and Ruin of the State.*

4. This

(k) *Pliny* l. 10. Epist. 68.

(l) *Which could neither be given, nor received, without the Danger and Ruin of the State.* Mariana 24. 16. commends this, and applies it to the Extravagant Magnificence of *Frederic* King of Naples. *Galba* resum'd *Nerva's* Grants, even those that were purchased, leaving 'em only a Tenth, *Tacitus* Hist. 1. and *Plutarch*. And *Perizinx* demanded of the Free-Men, what under the Pretence of Sales, they had got for nothing in *Commodus's* Reign. Thus *Basil* the Macedonian Emperor revoked what the Emperor *Michael* had given away. *Zonaras* speaking of him, ἐν οἷσιν ὁ αὐτὸς ἀπέδωκεν &c. It was universally agreed on, that those who had received Money without any just Title to it, should refund, some All, some half. See the same Author in his *Isaacius Comnenus* of Grants made by *Lewis* the Eleventh; see *Serranus* in *Charles* the Eighth of some of his Grants made even to Churches, and yet resum'd; see *Philip Cominaus*, l. 9. Mariana, l. 10. c. 16. of some Grants repeal'd, which *Ramirus* King of Arragon had made. Of Grants of *Isabella* revers'd even by herself, 28. 11. *Cromerus* of the Will of *Casimir* King of Poland, partly allow'd, partly disapprov'd, 12.

4. This also may here be added, that if by any *Accident* a *Contract* made by a *King* appear to be not only *disadvantageous*, but also *pernicious* to the *State*; so that at the time when the *Contract* was so made (if it had been applied to that Case) it had been judged *unlawful* and *unjust*; then may that *Contract* be not so much *revoked* (m) as declared no longer obliging, as if it were made conditionally of being void in that case, without which Condition it could not have been justly made.

5. And what is here said of *Contracts* is true also (n) in the *Alienation* of the *People's* Money, and of any other things which the *King* has a Power by *Law* to *alienate* for the *Publick* Good; for here also is this *Distinction* to be observed, whether there is any *probable* Reason for *giving*, or otherwise alienating what is the *People's*.

6. But if the *King* shall by any *Contract* endeavour to *alienate* any part of his *Kingdom*, or of the *Royal* Patrimony, beyond what is permitted him, such a *Contract* shall be of no force, as being made of what was not his own to *dispose* of. As much may be said of such *Kingdoms* as are *limited* or *restrained*; if the *People* have *exempted* any, either *matter* or *kind* of Acts from the *Power* of the *King*. For to make such Acts *valid*, the *Consent* of the *People* by *themselves*, or their *Representatives*, is required, as we have shewed already, when we treated of *Alienations*. Which *Distinctions* being observ'd, it is easie to judge whether the *Exceptions* of *Kings*, who

(m) As declared no longer obliging] C. Suggestum est de decimis. You have an Instance of it in the Acts of *Alfonsus* and *Sanctius* in *Mariana*, l. 12. c. ultimo in *Camden* in the aforesaid Year 1595 and 1597. in *Controv. Hanſiatic.*

(n) In the *Alienation*.] You have several things relating to this Affair in *Conc. Gall.* Tom. 3.

Of Leagues and Sponsions or Public Engagements.

I. **U**lpian has divided all Conventions into Public or Private. The Public he explains, not as some think, by a Definition, but by Examples. The first, *Whereupon a Peace is concluded.* The second, *When Generals agree some things between themselves.* By Public Agreements then he understands those which cannot be made, but by them who have the Right of Empire more or less; by which they are distinguished, not only from the Contracts of private Persons, but also from the Contracts of Kings which they make in their private Affairs. Tho' even from these private Contracts a War is sometimes occasioned, but often from the Public. Wherefore since we have largely treated of Conventions or Covenants in general, we shall now add something concerning this kind, which is the most excellent of all others.

II. Now these Public Conventions, which the Greeks call *συνδικαια*, Conventions or Accommodations, we may divide into Leagues, Sponsions or Public Engagements, and other Articles of Agreements.

III. I. The Difference between Leagues and Engagements may be learnt out of the Ninth Book of Livy, where he rightly tells us, that Leagues are such as are made by the Command of the Sovereign Power, and whereby the whole Nation is exposed to the Wrath of God, if they violate it. This used to be done among the Romans by the Heralds in the Presence of the King at Arms; but a Spontion or Publick Engagement is when the Generals, having no Order from the Sovereign Power about

which
of the
to
I. What
publick Con-
ventions
are.

VIX
ad redit
ed elect
Th. They are
divided into
Leagues and
Publick En-
gagements
or Sponsions,
and below
Agreements.
III. The
difference
between
Leagues
and Engage-
ments or
Sponsions,
and how far
publick En-
gagements
oblige.

about such a matter, yet promise something relating to it. We read in *Sallust*, *The Senate have with abundance of Reason decreed, that without theirs and the People's Order no Treaty shall be made.* *Jerome* King of *Syracuse*, according to *Livy*, having contracted an *Alliance* with *Hannibal*, he sent afterwards to *Carthage*, to turn that *Alliance* into a *League*. And therefore (a) that of *Seneca the Father* (since the *Emperor* has made a *League*, the *Roman People* may be said to have done it, and to be included in it) relates to those *Ancient Generals*, who had received a special *Commission* for that purpose. But (b) in *Monarchies* the sole *Power* of making *Leagues* is in the *King*, according to *Euripides* in his *Supplikes*.

— τὸ δ' εἰ δ' ὁμνύουσι χρεών
 Ἀδραστοῦ ἑταῖροιο κύριοι τὸ πᾶν ὦν
 Πάσις ὑπὲρ γῆς Δαναῶδ' ὄρκωτο μὲν.

Adrastus must Swear, the Crown of Greece is his, His the Prerogative of binding All by Oath.

For we must read it there, as we observed, ὄρκωτο μὲν and not ὄρκωτο μὲν.

2. Now as *inferior Magistrates* cannot oblige the *People*; so neither can the *lesser part* of the *People*.

(a) That of *Seneca the Father*.] *Contr.* 4. 29.

(b) In *Monarchies* the sole *Power* of making *Leagues* is in the *King*.] See what's below, 1. 3. co. 2. §. 11, &c. *Servius* upon that Passage of the 2d *Aeneid*.

But you, O *Troy*, preserve the Faith you gave,
 If I so save my self, your Empire save;

Dryd.

Because what the *King* promises, the *State* does seem to promise. And where *Aeneas* going to fight a *Duel*, first enters into a *League* with *Latinus*; he does not, says he, bring in *Turnus* Swearing because when the *King* is present, he has no *Power* to do it.

ple oblige the whole; which makes for the Romans against the Gauls of the Senones, for the greater part of the People was with the Dictator Camillus; but as it is in Gellius, there's no treating with one and the same People two different ways?

3. But let us enquire how far they are bound, who not being impower'd by the People, do yet undertake for that which directly concerns them. Some perhaps may think, that if the Sponsors, or Persons engaging, use their utmost Endeavour to perform what they have undertaken, they are sufficiently disengag'd from their Word, according to what (c) we have said before, concerning Promises made by a third Person. But the Nature of the business upon the account of which this Contract is made, requires a stricter Obligation. For no Man in Contracts will give or promise any thing of his own, but he expects something to be allow'd him in the lieu of it. Whence it is, that by the Civil Law, which will not allow of one Man's Promise for another Man's Fact, a Promise that engages that such or such a thing shall be confirm'd and ratify'd, does oblige the Promiser to stand to his Engagement, and to make ev'ry Article good.

IV. Menippus, King Antiochus's Ambassador to the Romans, as (d) Livy relates it, being guided by his own Interest more than by the Rules of Art, divided the Leagues of Princes and States into three sorts, the first whereof is, when the Conqueror gives Laws to the Conquered; where it is in the Conqueror's Power, and left to his Discretion to determine what the Conquered shall have, and how he shall be punished. The second is, when both Parties

IV. Menippus's Division of Leagues rejected.

(c) We have said before.] In the 11th Ch. and 22d §. of this B.

(d) Livy.] Add Diodorus Siculus Exc. leg. 4.

ties being every way equal, do agree to an *Amicable League* upon *equal Terms*; and then by *Agreement* things taken on either side are to be *restored*; and if any Man has been disturbed in his Possession, during the *War*, the Difference is to be accommodated, either according to *ancient Right*, or according to the *mutual Profit and Advantage* of both Parties. The *third* is, when they who never were *Enemies*, do enter into an *Alliance*, without giving or receiving Laws on either side.

V. Leagues divided into those that injoin the same that the Law of Nature does; and from whence this arises.

V. 1. But for our part we shall make a more accurate Division, by saying that there are two Kinds of *Leagues*, either those that require such Things only, as are agreeable to the *Law of Nature*, or those that add something more to it. *Leagues* of the former Kind, are generally made not only between *Enemies* upon the Conclusion of a *War*, but were formerly often made, and indeed were in some sort *Necessary* among those who before had never contracted for any thing. And the Reason of it was, because as that *Principle of Natural Right*, which maintains that there is a Kind of *Natural Relation* between all *Mankind*, and therefore it is a *heinous Crime* for one Man to hurt another, was effac'd of old before the Flood, so was it again sometime after, by a general *Corruption of Manners*, so razed and obliterated, (e) that it was accounted lawful to rob and plunder Strangers,

(e) It was accounted lawful to rob and plunder Strangers, though no War was proclaim'd.] Cæsar speaking of the Germans; Robberies that are committed without the Bounds of each respective State have no manner of Disreputation in 'em. This is confirm'd by Tacitus in his Account of the Customs of Germany, and by Saxo, l. xiv. and in several other Places. The same is reported of the Tyrrhenians by Servius, upon the viiith and xth *Æneid*, and of other Nations upon the first *Æneid*; and of the Portuguese by Diademus Simoes; with whom agrees Plutarch in his *Marine*; τὸ λεγόμενον ἐπὶ τῆς θάλασσης.

gery, tho' no War was proclaim'd, which *Epiphanius* calls *Σκοβισμός*, the *Scyrbian Fashion*.

Hence that Question in (f) *Homer*, *Are you Free Booters?* is a Complaisant and Inoffensive Inquiry, (g) which also *Thucydides* takes notice of, and in the old Law of *Solon* you have the Companies *ἐν δόξαν ἱπποπόλων* of the Free-Booters; for as *Justin* says, *Piracy* was to the Days of *Tarquin* a commendable and glorious Enterprize; 'tis the very same in that Maxim of the *Roman Law*, where 'tis declar'd, that if there be any Nation with whom the *Romans* have no Alliance, nor Dealings, nor Treaty of Friendship, they are not to be reputed profess'd Enemies, but yet whatever they can get of the *Romans* shall be lawful Prize, and if they take a *Roman*, he shall become their Slave, and the same is to be observ'd, if any one of them falls into the Hands of the *Romans*; in which Case too the Right of *Postliminy* shall be allow'd. Thus the *Corcyreans* formerly, before the *Peloponnesian War*, were no Enemies to the *Athenians*, yet had they neither Peace nor Truce with them, as appears from the Speech of the *Corinthians* in *Thucydides*. So *Sallust* speaks of *Boacchus*, *Nobis neque bello, neque pace cognitus*, known to us neither by Peace or War. From hence to pillage Barbarians, or Strangers, was thought

VOL. II.

Z

by

ἐχὶ κάλλιστον ἡγεμόνων, the Spaniards even to that Day look'd upon Robbery as a very Handsome Employment. Just so the Jews deny that there's any Satisfaction to be made to an injur'd Person, if he is neither a Jew nor a Confederate of the Jews.

(f) *Homer*. [Odyss. III. Where the Schollast says, *ἐκ δόξαν ἱπποπόλων*, τοὺς ἐν δόξαν, τὸ ἐν δόξαν, ἀλλ' ἐν δόξαν, Robbing was formerly so far from being infamous, that it was counted Reputable and for a Honour.]

(g) *Thucydides* takes Notice of. [L. I. Where he subjoins, *ἐν δόξαν ἱπποπόλων*, ὡς ἐκ δόξαν τὰ τὰ ἱπποπόλων, ὡς ἐκ δόξαν τὰ τὰ ἱπποπόλων, and the Affair thus instead of being scandalous, it acquir'd a Reputation with it.]

by *Aristotle* a very laudable Practice, and the word *Hoflis*, an *Enemy*, in the old *Latin* signifies no more than a *Foreigner*.

3. Under this kind I comprehend also *Cauti-
onary Leagues*, which provide for the *Freedom* of
Commerce and *Entertainment* of *Strangers* on both
sides, as agreeable to the *Law of Nature*, where-
of we have treated elsewhere; thus we find
this Distinction us'd by *Argo* in *Livy*, in an Ha-
rangue of his to the *Achæans*, where he does
not insist upon any *Confederacy*, but only so
good an *Understanding*, as might secure each other's
Rights; that they might not protect and give
Sanctuary to the Run-away *Slaves* of the *Mace-
donians*. All such Agreements the *Greeks* strictly
call εἰρήνη, *Peace*, and oppose ἐμὸν δαῖς, to
Leagues, as you may see in several Places, and par-
ticularly in the *Oration* of *Andocides* upon the *Peace*
with the *Lacedemonians*.

VI. And in-
to those that
add some-
thing to it;
and those
are either
upon Equal
Terms:

VI. 1. The Conventions which add something
to the *Law of Nature*, are concluded either on equal
or unequal Terms. (b) The equal are those, αἱ
ῥῶς καὶ τοῖς ἐν ἀμφοτέρω ἐχούσι, which are alike
on both sides, as *Isocrates* speaks in his *Panegyrick*.
To which that of *Virgil* alludes.

Both equal, both unconquer'd shall remain
Join'd in their Laws, their Lands, and their Abodes.
Dryden.

And

(b) The Equal are those.] So *Pliny* says, that the *Parthians* liv'd
with the *Scythians* upon one and the same Foot. And *Pompey* in
Lucan speaking of the same Nation of the *Parthians* says:

— Solus

Ex æquo me Parthus adit.

With me

The Parthian only comes upon the Square.

And these the Greeks sometimes call *συνθήκας* simply, *Alliances*, sometimes *συνθήκας ἐν ἴσῃ καὶ ὀμοίᾳ*, *Alliances upon the square*; as you may find in *Appian* and *Xenophon*; and those upon unequal Conditions more properly, *παραβάς*, *Leagues*, and in respect to *Inferiors*, *παραγγέλματα*, *Injunctions*, or *συνθήκας ἐκ τῶν ἐπιταγμάτων*, *Leagues of Injunction*; which *Demosthenes* says are to be carefully avoided by all those who love Liberty, because they come very near a state of *Slavery*.

2. Both these *Leagues* are made either for the sake of *Peace*, or for the sake of some *Confederacy*. *Treaties of Peace* upon equal Terms are generally made for the restoring of *Prisoners* or *Goods* taken in *War*, and for mutual Security, of which I shall treat hereafter, when I come to speak of the *Effects* and *Consequences* of *War*. *Treaties of Alliance* upon equal Conditions, respect either *Commerce*, or the joining of *Forces*, and sharing the *Expence* of the *War*, or some other Matters. *Leagues of Commerce* may be various; as that no *Custom* shall be paid on either side, which was in the old *League* between the *Romans* and *Carthaginians*, except only what was given to the *Notary* and the *Crier*; or that no more shall ever be demanded, than what is at present pay'd, or that a certain *Rate* shall be fix'd.

3. So also in a *Confederacy* of *War*, that each Party shall contribute an equal Number of *Foot*, *Horse* or *Ships*, and that either in all Wars, which the Greeks call (i) *Συμμαχίαν*, a *Conjunction of Arms*, which *Thucydides* thus explains, *τὸς αὐτοὺς ἐχθροὺς καὶ φίλους νομίζειν*, to look upon those who are *Enemies* and *Friends* to one, to be so to the other. And this we often

Z 2

meet

(i) *Συμμαχίαν*. a *Conjunction of Arms*.] The Ancients term'd it *ἐπαρχίαν*, *An Union of Spears*. Zofimus l. v.

meet with in *Livy*, either only for the Security of the Country, which he calls ἐμπλαχίαν, a *Defensive League*; or a *Confederacy* for one particular War, or against such a particular Enemy, or against all Enemies whatever, excepting their Allies, as in the League between the Carthaginians and Macedonians mention'd by *Polybius*: Thus the Rhodians enter'd into Articles with *Antigonus* and *Demetrius*, to assist them against all Enemies whatsoever, except *Ptolemy*. The like equal Leagues may be made in respect of other Things; as that (k) neither Party shall erect any Forts on the other's Borders, that neither shall Protect the other's Subjects, nor grant an Enemy leave to March through their Country.

VII. Or upon Unequal, which are again divided.

VII. 1. From what has been said of Equal Leagues, we may easily understand what is meant by Unequal ones; which Inequality may respect either the stronger or the weaker. That of the stronger is, when Assistance is promised, but none required again, or when more is promised on that side than on the others. Unequal Conventions on the weaker Part, or as *Isocrates* speaks in his *Panegyrick*, τὰ τὰς ἐτέρους ἐλαττωτέρα παρὰ τὸ δίκαιον, where one side is depress'd more than is Just and Reasonable, are those which we said are call'd περσάγματα Injunctions, or ἐμλάγματα Commands. And these are such as do either lessen or not lessen the Sovereign Jurisdiction.

2. An Alliance that lessens the Sovereign Jurisdiction is such one, as was the second League between the Romans and the Carthaginians, in which it was provided, that the Carthaginians should make no War without the leave of the Romans. And from that time, as *Appian* observes, καρχηδόνιοι Ῥωμαίοις

(k) Neither Party shall erect any Forts on the other's Borders.] See an instance of this in *Procopius*, *Perf.* 1.

Ῥωμαίοις ὑπήκουον ἑταίροισι, the Carthaginians by that League became Subjects of the Romans. To this also may be referred a *Conditional Surrender*, but that is not so much the lessening the Sovereign Jurisdiction, as the perfect transferring of it to another. Yet is such an *Agreement* sometimes called by the Name of a *Treaty*, as *Livy* in his 9th Book; the Teates in Apulia requested, that they might be admitted to a League, not to be upon equal Terms, but under the Dominion of the Romans.

3. In an *Unequal Alliance*, that does not lessen the *Sovereignty*, the Terms impos'd are either for such a certain time only, or for a *Continuance*. For a certain time, such as oblige the *Payment* of the Forces employ'd in the present Service, the demolishing the Walls, the quitting some Places, the giving Hostages, the delivering up Elephants and Ships. The Conditions for a *Continuance* are such as oblige all Reverence and Honour to the other's Power and Majesty. How far such an Alliance extends, we have elsewhere shewed. Next to this, is, that they account the Friends and Enemies of the other Party *Theirs*, that they allow no Passage through their Country to any Troops that belong to those they are at War with; as also these less considerable Articles, as that they shall not fortify such and such Places, nor lead an Army thither, nor have above such a number of Vessels, nor build any City, nor Traffick, nor levy Soldiers in certain Places, nor fight against their Allies, nor supply their Enemies with Provisions, nor receive those who come from such and such Parts; that they renounce all former Treaties; of all which you may see Instances in *Polybius*, *Livy*, and other Authors.

4. *Unequal Leagues* are also made, not only between the Conquerors and Conquered, as *Menippus* supposed, but also between People of unequal Power,

er, even such as never were at War with one another.

VIII. *Alliances made with those who do not profess the true Religion are allowed by the Law of Nature:*

VIII. Concerning *Leagues* it is often disputed, whether they may be lawfully made with those who are *Enemies* of the true *Religion*, which is not to be doubted in Respect to the *Law of Nature* only. For that *Law* is so kind to all, that it will not allow of any Difference on the account of *Religion*; the Question is then, whether by the *Law of God* it be lawful or not, which has been the subject of frequent Controversie, (1) not only among *Divines*, but among some *Lawyers* too, of which number are *Oldradus* and *Decianus*.

IX. *Nor Universally forbidden by the Hebrew Law;*

IX. 1. Let us then first consider, what the old *Divine Right* directs in this Affair, and afterwards we will consult the new. We find that *inoffensive Leagues*, and such as tended to no one's Injury, might be'ore the time of *Moses* be contracted with People of a different Perswasion; we have an Instance of this in *Jacob's Treaty* with *Laban*, not to say any thing of *Abimelech*, because it does not fully appear that he was an *Idolater*. Nor did the *Mosaic Law* make any Alteration here. Let the *Egyptians* be a *Precedent*, who doubtless were *Idolaters*, yet the *Hebrews* were strictly forbid to abhor or have any *Aversion* to 'em. But we must except the *seven Nations*, who were by the *Almighty* himself devoted to Death, and the *Israelites* appointed to execute that Sentence, for they persisting in their *Idolatry* and refusing Subjection, the *Jews* were commanded not to spare them; to whom also the *Amalekites* were added by the *Divine Decree*.

2. As

(1) Not only among Divines.] viz. Antonipus, Cajetanus, Toletus, Molina, Valdesius, Malderus.

2. As to Leagues of Commerce, and the like, either for a *mutual* Advantage, or that of *one* Party only, that such might be made with *Profane* People is allowable by the *Law*, for we find nothing against it. Witness the Examples of *David* and *Solomon*, who made a *League* with *Hiram* King of *Tyre*, where it is remarkable, that it is said in *Holy writ*, that this *League* was made according to the *Wisdom* that *God* had given him.

3. The *Law* of *Moses* indeed does especially command them to do good to their own Nation, ἀγαπᾶν τὸν πλησίον, *to love their Neighbour*. Besides, the peculiar way of *eating* and *Form* of *Manners* prescribed to the *Jews* could not well suffer them to have any familiar *Conversation* with *Strangers*. But hence it does not follow, that it was not *lawful* for them to do good to *Strangers*, or that it was not also *commendable*, tho' the corrupt *Interpretations* of the *Modern Rabbins* infer the contrary: Whence *Juvenal* observes of the *Jews*.

Non monstrare vias eadem nisi sacra colenti.

*Ask 'em the Road, and they shall point you wrong,
Because you do not to their Tribe belong.* Dryd.

Where the Instance of not directing a *Stranger* in the *way*, implies the *Refusal* of the least and most trifling Favours, Favours that cost 'em, neither *pains*, nor *charge*, which *Cicero* and *Seneca* acknowledge, we should do to *utter Strangers*. And *Tacitus* speaking of the same says, *Inviolable in their Faith, always ready to assist one another, but to all the World besides they bear a mortal hatred*. Thus we read in the *New Testament*, that the *Jews* used not, συγχρηᾶν, συνεδίειν, κολληᾶν, προσέρχεσθαι, *to have any Dealings, not to eat, not to converse with, or come unto one of another Nation*. And *Apollonius*

Molo objected to them, *ὅτι μὴ παρέδιδοντο τὰς ἀλλὰς &c.* that they receive none, who entertain Notions of God different from them, nor will they have any thing to do with those whose Method of living is not intirely Correspondent to theirs. And the Friends of Antiochus in Diodorus accuse the Jews; *μὴνεν ἀπ' αὐτῶν ἰδὼν &c.* that they are of all People the most unfociable to Strangers, and take 'em all for Foes. And then there follows; *μὴδ' ἐν ἄλλῳ &c.* they'll admit no other Nation to their Table, nor even give 'em a good Wish. And presently they're charged with *μισανθρωπία*, a detesting of all Mankind. And in Philostratus, Tyanens speaks thus of the Jews; *οὐ βίον ἀμιχλὸν ἐνέχουσιν &c.* they have found out so unconvertible a way of living, that they will not so much as eat with other Folks. And accordingly in Josephus very frequently, the *τὸ ἀμιχλόν, τὸ ἀσυμφυλόν, ἢ διακρίνεις ἀμιχία*, the Jews Unsociableness and Inhospitallity are thrown in their Teeth.

4. But Christ has by his own Example taught us, that this is by no Means the Meaning and Design of the Law, when he, who was himself the strictest Observer of it, did not scruple to receive Water at the Hands of the Woman of Samaria. Nor did David formerly make any Difficulty in retreating to People of another Religion, nor was he ever blamed for it. And Josephus introduces Solomon, after he had dedicated the Temple, and had beg'd of God that he would hear the Pray'rs even of Foreigners when offer'd up there, delivering himself thus: *ἡμεῖς ἐκ ἀπάνθρωποι τὴν φύσιν ἐσμὲν ὅτι ἀλλοτρίως περὶ τὰς ἐκ ὁμόφυλός ἐχομεν*, for we are not inhuman in our Natures, nor are we averse to those, who are not of the same Nation and Family with our selves.

5. From this Rule we are to except, not only the seven Nations before mention'd, but also the Ammonites and Moabites, of whom it is written,
Deut.

Deut. xxiii. 6. Thou shalt not seek their prosperity, (for so in this Passage, you had better render עוֹלָם than their Peace) nor their Good, all thy Days for ever. In which words they were forbidden to make any League of Friendship with them; yet it gives them no Right to make War against them: or perhaps this Place may be rather understood, according to the Opinion of some of the Hebrew Doctors, to prohibit seeking Peace from them, but not the accepting of it, when they themselves offered it; it is certain, they were forbid to make War against the Ammonites, Deut. ii. 19. nor did Jephtha fight against them, till he had tryed all the ways of an Equitable Accommodation, nor David, till provoked by intolerable Affronts. The remaining Question then is, whether it be lawful to enter into a Confederate War with Infidels.

6. That this also was not unlawful before the Law, appears from the Example of (m) Abraham, who with his Army assisted the wicked Sodomites; nor do we read, that the Law of Moses did in general alter any thing in this Affair. Of the same Opinion were (n) the Asmoneans, who were both very Skilful in the Law, and great Respecters of it,

(m) Abraham] He also made a League with Eshcol and Aner. As David did with Achis and Ngashon; Solomon with the Egyptians; Asa with Benhadad.

(n) The Asmoneans, who were both very Skilful in the Law and great Respecters of it.] You have Commendations of 'em in the Chaldee Targum, in the Books of the Maccabees, and in the Epistle to the Hebrews. Several Christian Emperors and Kings following them as their Precedent enter'd into Treaties and Alliances, either with those who were no Christians at all, or at least not very Orthodox ones; as Constantine with the Goths and Vandals; Justinian with the Lombards; Theodosius, Honorius, Leo, Heraclius, Basil, Isaacius Angelus, Palaeologus with the Saracens, Lithuanians, Gepida, Franks, Swedes and Vandals; Alfonso Hispanensis, Ramirus, Alfonso Castus;

is, witness their religious keeping of the Sabbath, Twerein however they allow'd the use of Arms in their own Defence, but no otherwise : And yet these very People made an Alliance with the Lacedemonians, and the Romans, with the consent both of Priests and People, nay they appointed Solemn Sacrifices for their Safety. But as to the Authorities alledged against this Opinion, they may have their particular Reasons.

7. For if there were any Kings or Nations (besides those mention'd in the Law) that were so wicked, that God by his Prophets had declared his intent to destroy them as hated by him, to undertake their Protection, or to joyn in Confederacy with them, was without doubt unlawful. To this purpose is that of the Prophet (o) to Jehosaphat for making League with Ahab; Shouldest thou help the wicked, and love them (p) that hate the Lord? therefore is wrath upon thee from the Lord. For Michaiab the Prophet had before foretold the ill Success of that War. And that of another Prophet to Amaziah. Let not the Army of Israel go with thee, for the Lord is not with Israel; to wit, with all the Children of Ephraim. But this was not from the Nature of the League, but on the Account of the peculiar Quality of the Person, as may be evinced

Castellus Sanctius Castella, Ferdinand the Holy, Kings of Spain with the Moors; so Peter King of Leon; the Wise Alfinus King of Castile; Rodolphus Habsburgensis with the Tartars. Go and consult Johannes de Carthagena. l. iii. c. 1. de jure belli Romani Pontificis, c. 1. and Pope Julius the second made use of the Turks.

(o) To Jehosaphat.] Josephus, *ἡτις τὸ ἑὸν ἄχατον συμμαχίας ἀνδραγαθὸν ἀρετὴν καὶ, πορνείαν*, he blamed him for entering into a League with Ahab an Irreligious and Wicked Man.

(p) That hate the Lord.] Gratian return'd this Answer to his Uncle Valens, who desir'd his Assistance against the Scythians, *ὡς ἔστι τὸ ἐχθρὸν τῷ θεῷ συμμαχεῖν*, one ought not to engage in any Treaty with a Man who is an Enemy to God.

evinced from hence, that God did sharply rebuke and threaten *Jehosaphat*, for entering into a Treaty of Commerce with *Abazia* King of *Isndel*, although that Treaty was no otherwise than what *David* and *Solomon* had made with *Hiram*, on which Account we told you that God did not only not reprove 'em but commended them. For as to that Clause, that *Abazia* did very wickedly; it is to be understood of the whole Course of his Life, which had render'd God an Enemy to him and all his Undertakings: as this Story is explain'd in the Book call'd the Constitutions of *Clement* the Vith, Chap. 8.

8. And this also must be observed, that the Case of those, who being *Israelites* had forsaken the Lord whom they knew, was far worse than that of mere Strangers; for against such *Revolters*, all the rest of the People were, (q) by the Law of *Deut.* xiii. 13. commanded to take up Arms.

9. Sometimes the Leagues themselves are blamed for the wicked Intention of those who made them; so the Prophet reproves *Asa*, for applying himself to the *Syrian*, in distrust to God; which he shew'd by sending the Things consecrated to God, unto this *Syrian*; so was he also blamed, in his Sickneſs, for putting his Confidence more in the Physicians, than in God. And therefore it no more follows from this History, that it is in it self, and in general an Ill Thing to enter into an Alliance with such People as the *Syrians*, than that it is so to consult a Physician. For the Mind and Intention sometimes makes that unlawful, which is not so in it self. As *David's* numbring the People. *Hezekiah's* shewing his Treasures. So in one Place the Confidence the *Jews* had in the *Egyptians* is reproved; when yet *Solomon* was allowed to be Related 'em by Marriage.

(q) By the Law of *Deut.* xiii. 13.] Add *Joshua's* Example, ch. xxii.

10. To which must be added, that the *Hebrews* under the *old Law* had the express *Promises* of *God* for *Victory*, provided they kept the *Law*, and therefore they had the less Reason to have recourse to *Human Assistance*. There are also many excellent Sentences in *Solomon* to dissuade us from associating with the wicked; but these are the *Advices* of *Prudence*, and not Precepts of the *Law*; and these very *Advices* themselves, as most of those which regard *Morality*, have several Exceptions to 'em.

X. Nor by
the Christi-
an Law.

X. 1. But the *Gospel* has made no Alterations in this respect; nay, it gives a greater Encouragement to such *Leagues*, by virtue of which, those who differ from us in Religion may be relieved in a just Cause; for as much as we are to do Good unto all Men, when an Opportunity offers; and this not only as a thing commendable, and left to our *Liberty* and *Discretion*, but as what we are commanded, and oblig'd to. For by the Example of *God*, who makes his *Sun* to arise on the *Just* and on the *Unjust*, and sends his *Dew* on the *Wicked*, as well as the *Righteous*, we are taught to exclude no Man from the Benefit of our *Kindness*. Excellently does *Tertullian* say, As long as *God* confin'd his Religion and Covenant to *Israel*, 'twas with Reason that he had 'em shew Mercy to their Brethren only. But as soon as ever he gave us *Christ* the *Heathen* for his Inheritance, and the utmost Parts of the *Earth* for his Possession, and what *Moses* had spoken began to be fulfill'd; the Nation which were not my People, is now my People, and the who had not obtain'd Mercy, has now obtain'd Mercy; from that Time has *Christ* extended his Law of *Brotherly Love* to all Mankind, excluding none from his Compassion any more than from his Call.

2. Which

2. Which however must be understood with some Degrees of Allowance, especially to those of the same Religion. So in *Clement's Constitutions*, *πᾶσι δὲ δικαίον δοῦναι ἑξ ὁμῶν τὸν ὅσον ἀγῶν*. We must give of our Labours to all, but especially must we regard the Saints. A perfect Liberality (says St. Ambrose) must be regulated by the Religion, the Occasion, the Place, the Time, in such a manner as that you may chiefly exercise it towards those of the Household of Faith. So Aristotle, *ἡ δὲ δικαιοσύνη προσηλὴν συνήδων, καὶ ὁμοίων προτιζέειν*, for there is no Reason, that we should take the same Care of Strangers, as of Friends.

3. Nor is our living together, and our Familiar Conversation with Men of another Religion, forbid; nor are we denied all manner of Commerce with those who are worse than these, such as are Apostates from and Contemners of the Rule of Christian Discipline, but only an Unnecessary Familiarity, and not what may give one Hopes of their Conversion. For as to that of St. Paul, *Be not Unequally yoked with Unbelievers, for what Fellowship hath Righteousness with Unrighteousness; and what Communion hath Light with Darkness; and what Concord hath Christ with Belial, or what Part hath he who believeth with an Infidel?* It relates to those who communicated with them in their Idol-Feasts, and so did either really commit Idolatry, or at least seem'd to do so. Which is plain from the following words, *What Agreement hath the Temple of God with Idols?* And to this Effect is what you have in the first Epistle to the Corinthians, *We cannot be partakers of the table of the Lord, and of the table of Devils.*

4. Nor must we conclude anything more from this, than that we should not make it our Choice to live under the Government of Infidels, or to intermarry with them; for in both these Cases the

the Exercise of the True Religion runs a greater Hazard, or at least meets with more Difficulty, than in the other Affair. Besides these Engagements are more lasting, and there's a greater freedom of Choice in Marriages; whereas Leagues must be enter'd into, according as the Conjunction of Time and Place requires. But as there's no harm in doing Good to Infidels, so neither is there any in desiring their Assistance, as St. Paul did that of Cæsar and of the Tribune.

XI. Cautions about such Leagues.

And therefore in this Case there is no Intrinsic or Universal Evil, but only (r) in regard to Circumstances. For which Reason we ought to take particular Care, that by our too intimate Conversation we do not infect or scandalize the weak; and to remedy this 'twill be very proper, that the dwelling of such People should be in some separate Place, as the Israelites liv'd by themselves and at a Distance from the Egyptians; for that of Antiochridas is not without its just Grounds:

Ὁμοῖον δὲ δουλεύειν συμμάχων &c.

Under your Colours I cannot, must not March;
For neither your Manners nor your Laws agree
With ours; but are vastly different.

And to this Purpose is what we have elsewhere alleg d

(r) Only in Regard to Circumstances.] See Phartazas's Speech to the Lacedæmonians in Agathias, l. iii. and Saxo l. ix. in the Words of Lewis the French King to Harold; 'Tis impossible that there can be any real Friendship and Agreement between Persons of a Different Persuasion in Sacred Matters; and therefore whoever addresses himself to another for his Assistance, should be sure in the first place to take Care that he is of the same Religion; for they, whom different Forms of Worship, and different Notions of God, have set at a Distance from each other, can never Heartily espouse the same Cause, or Unite upon any considerable Enterprize.

alleg'd concerning the scruple which the Jews and Christians had, about carrying Arms under the Command of Pagans.

2. But if such a Confederacy should very much augment and strengthen the Forces of the Infidels, it were better to abstain from it, unless upon absolute Necessity; and what Thucydides said in a like Case, is very much to the present Purpose, *οἱ ἄλλοι δὲ ἐμὲν τῶν ἑκκ. They are not to be envied, who are treacherously invaded, as we are by the Athenians, if they endeavour to get the Assistance, not only of the Greeks, but of the Barbarians. For every Right is not enough to justify us in the doing that which may, if not directly, yet indirectly prejudice our Religion. For we must first seek the Kingdom of God, that is the Propagation of the Gospel.*

3. It were to be wished, that many Princes and People, who at this Day have the Government in their Hands, would be mindful of that generous and pious Advice which Fulk Archbishop of Rhemes, once gave to Charles the Sincere, *Who cannot but tremble to consider, that you should (s) seek the Friendship of God's Enemies, and make use of the odious Arms and Alliances of Pagans, to the Ruin and Destruction of Christianity? for there is very little difference between confederating with Infidels, and the renouncing of God to Worship Idols.* And Alexander in Arrian says, *ἀδινεῖν μετὰ λατρείᾳ ἑτεροδόξων &c. That they were Guilty of the most Enormous Baseness, who would bear Arms for the Barbarians against Greece, contrary and in prejudice to the Rights and Laws of the Greeks.*

(s) Seek the Friendship of God's Enemies. You have an Instance in Manassa, in Nicosia's Account of the Affairs of Isaac Angelus, l. 11. where the Piety of Emanuel Duke of Savoy is highly applauded, who, when he could have recover'd Cyprus by the Assistance of the Turks, scorn'd the Proffer.

XII. All
Christians
obliged to
enter into
League a-
gainst the
Enemies of
Christianity

XII. I shall here add this, that since all *Christians* are Members of one *Body*, which are commanded to have a *Fellow-feeling* of each other's *Sufferings*, as that Command affects every *single Person*, so should it every *Nation* as they are a *Nation*, and all *Kings* as they are *Kings*. Nor ought any one to serve *Christ* in his *Person* only, but also to the utmost of that *Pow'r* he is intrusted with. But this neither *Kings* nor *People* can well do, whilst an *Impious Enemy* carries all before him, (x) unless they heartily *assist* and *stand by* one another; which cannot be done conveniently without a general *League*, and *Confederacy* to that very Purpose; and such a *League* has formerly been made, and the *Roman Emperor* was unanimously chosen *Generalissimo* of it; all *Christians* then are obliged to contribute either *Men* or *Money*, according to their *Ability*, to this *Common Cause*; and how they can be dispens'd with this, I cannot see, unless they are such as are engaged in an unavoidable *War*, or visited with some great *Calamities* at home.

XIII. If
several of
our Allies
are at War,
which of 'em
we ought to
assist; ex-
plained by
Distinctions.

XIII. 1. And this is another Question which uses to arise, whether of 'em, supposing several Nations to be engaged in War with another, we are obliged to assist, they being all of 'em equally our *Allies*. In the first Place we must remember, what I said before, that no *League* can bind us to an *unjust War*: And therefore (u) he of the *Confederates* is to be preferred, who has the *juster Cause*, if

(x) Unless they heartily assist and stand by one another.] Upon this Subject see *Marians* l. xxx. *Parus* l. iv. *Bizar*, vii and xii.

(u) He of the *Confederates* is to be preferred who has the *juster Cause*.] See below, B. 3. Ch. 25. §. 4. And in the Form of the Oath of Fidelity is said, If I shall understand that you have a Mind to make an *Offensive War* upon just Grounds; and I shall be either generally or particularly

if it be against one who is *not* our *Confederate*; nay, though it be against another *Confederate*. Thus *Demosthenes* in his Oration about *Megapolis*, shows that the *Athenians* were obliged to help their *Confederates* the *Messenians*, against their other *Confederates* the *Lacedemonians* if the *Lacedemonians* were the *Aggressors*; which holds true, unless it be expressed in our Articles, not to send *Aid* against such an *Ally*. In the Agreement which *Hannibal* made with the *Macedonians*, there is this, *We will be Enemies to your Enemies, if you except the Kings, Cities, and Ports, which are in League and Amity with us.*

2. But if our *Confederates* engaged in War, have each of 'em an unjust Cause, (which may sometimes happen) we are then to stand *Neuters*. So *Aristides* in his 5th *Leutric*, εἰ μὴ ἐν ἀλλοτρίῳ &c. If either of our *Allies* had desired our Assistance against *Strangers*, we would presently have complied with the Request; but if they want us to be employed against one another, we won't concern our selves at all.

3. If our *Confederates* be engaged in a just War, and require our Assistance; if we are able, we ought to send each of 'em either Men or Money. But if a *Prince* be demanded personally to assist both, having so promised; because his *Person* cannot be divided, it is reasonable that (x) he should prefer him, with whom he has been the longest in Alliance, as the *Epirots* told the *Lacedemonians* in *Polybius*: The like Answer was returned to the *Campans* by the *Roman Consul*, *When we enter into new Treaties and Friendship, we ought to take special*

VOL. II.

A a

cial

particularly required thereunto, I will, to my utmost, give you my Assistance.

(x) He should prefer him with whom he has been the longest in Alliance.] See l. 4. c. 31. de Feudis.

XII. All
Christians
obliged to
enter into
League a-
gainst the
Enemies of
Christianity

XII. I shall here add this, that since all *Christians* are Members of one *Body*, which are commanded to have a *Fellow-feeling* of each other's *Sufferings*, as that Command affects every *single Person*, so should it every *Nation* as they are a *Nation*, and all *Kings* as they are *Kings*. Nor ought any one to serve *Christ* in his *Person* only, but also to the utmost of that *Pow'r* he is intrusted with. But this neither *Kings* nor *People* can well do, whilst an *Impious Enemy* carries all before him, (t) unless they heartily *assist* and *stand* by one another, which cannot be done conveniently without a general *League*, and *Confederacy* to that very Purpose; and such a *League* has formerly been made, and the *Roman Emperor* was unanimously chosen *Generalissimo* of it; all *Christians* then are obliged to contribute either *Men* or *Mony*, according to their *Ability*, to this *Common Cause*; and how they can be dispens'd with this, I cannot see, unless they are such as are engaged in an unavoidable *War*, or visited with some great *Calamities* at home.

XIII. If
several of
our Allies
are at War,
which of 'em
we ought to
assist; ex-
plained by
Distinctions.

XIII. 1. And this is another Question which uses to arise, whether of 'em, supposing several *Nations* to be engaged in War with another, we are obliged to assist, they being all of 'em equally our *Allies*. In the first Place we must remember, what I said before, that no *League* can bind us to an *unjust War*: And therefore (u) he of the *Confederates* is to be preferred, who has the *juster Cause*, if

(t) Unless they heartily assist and stand by one another.] Upon this Subject see *Marians* l. xxi. *Pavata* l. iv. *Bizar*, vii and xii.

(u) He of the *Confederates* is to be preferred who has the juster Cause.] See below. B. 3. Ch. 25. § 4. And in the Form of the Oath of Fealty 'tis said, If I shall understand that you have a Mind to make an Offensive War upon just Grounds, and I shall be either generally or particularly

if it be against one who is *not* our *Confederate*; nay, though it be against another *Confederate*. Thus *Demosthenes* in his Oration about *Megalopolis*, shows that the *Athenians* were obliged to help their *Confederates* the *Messenians*, against their other *Confederates* the *Lacedemonians* if the *Lacedemonians* were the *Aggressors*; which holds true, unless it be expressed in our Articles, not to send *Aid* against such an Ally. In the Agreement which *Hannibal* made with the *Macedonians*, there is this, *We will be Enemies to your Enemies, if you except the Kings, Cities, and Ports, which are in League and Amity with us.*

2. But if our *Confederates* engaged in War, have each of 'em an unjust Cause, (which may sometimes happen) we are then to stand *Neuters*. So *Aristides* in his 5th *Leuctric*, εἰ μὴ ἐν ἀλλοτρίῳ καὶ ἑτέρῳ &c. If either of our Allies had desired our Assistance against Strangers, we would presently have complied with the Request; but if they want us to be employed against one another, we won't concern our selves at all.

3. If our *Confederates* be engaged in a just War, and require our Assistance; if we are able, we ought to send each of 'em either Men or Money. But if a Prince be demanded personally to assist both, having so promised; because his Person cannot be divided, it is reasonable that (*) he should prefer him, with whom he has been the longest in Alliance, as the *Epirots* told the *Lacedemonians* in *Polybius*: The like Answer was returned to the *Cambrans* by the *Roman Consul*, *When we enter into new Treaties and Friendship, we ought to take spe-*

VOL. II.

A a

cial

tiicularly required thereunto, I will, to my utmost, give you my Assistance.

(*) He should prefer him with whom he has been the longest in Alliance.] See l. 4. c. 31. de Feudis.

cial care (y) that we do not violate and infringe the old.

4. But this will also admit of the Exception, unless the *latter* League has something in it beyond a bare *Promise*, (z) for it may include the transferring of the *Property*, and imply somewhat of *Subjection*. (a) And thus in the case of a *Sale*, we say the *first* is the *best*, unless the *latter* has actually transferr'd the *Property*. So *Livy* reports of the *Nepefines*, that the Faith given upon their *Surrender* was more obliging, than that of former Leagues. Some distinguish between these more nicely; but what I have said, as they are nearer to *Simplicity*, so are they to the *Truth*.

XIV. Whether a League may be renewed easily.

XIV. A League made only for a time, upon the expiration of that time, is not presumed to be renewed by *Silence*, unless such *Acts* intervene, as can bear no other Construction; for a new Obligation must not easily be presumed.

XV. Whether a Violation on one side frees the other from being obliged.

XV. If either Party break the League, the other is freed, because each *Article* of the League has the force of a *Condition*. Thus we find in *Thucydides*, λυσι τὰς συνθήκας ἔχ' οἱ &c. The League is violated, not only by those who being deserted apply themselves to others for Assistance, but by those who do not perform in Deeds, what they promised upon their Oaths. And in another place, ὁ τι δ' ἂν τούτων παραβαίνωσιν &c. If either Party offend against the Articles they have sworn to, never so little, the League is broke. But this

(y) That we do not violate and infringe the old.] χρὴ φίλους κατ' ἐχθρῶν συμμαχεῖν, ἢ κατ' φίλων, Friends ought to join their Forces against Enemies and not against Friends, says *Ptolomy* to the Athenians in *Appian*, Excerpt. legat.

(z) For it may include the transferring of the Property.] See *Radevicius* 11. 7.

(a) And thus in the Case of a Sale.] By an Edict of *Theodoric*, c. 138.

this is only true, in case it be not agreed on to the contrary, which sometimes is done, that a *League* solemnly sworn to should not be esteemed broke upon every slight Offence.

XVI. There may be as many Sorts and Subjects of *Sponsions* or *publick Engagements*, as there are of *Leagues*. For these differ only in the Capacities and Power of the Persons who make 'em. But there are *two* Questions generally started about *Engagements*. The *first* is, how far the Persons engaging are oblig'd, in case the *Prince* or the *State* should disapprove of the Engagement, whether they are oblig'd to make every thing Good, or whether to put Affairs into the same Posture they were in before the Engagement, or whether their *Bodies* are to be deliver'd up. The *first* seems agreeable to the *Civil Law* of the *Romans*; the *second* to *Equity* and *Reason*; which the *Tribunes* of the People, *L. Livius* and *Q. Melius*, urged in the *Caudine* Controversie. The *third* is approved by *Use* and *Custom*, as appears by the Examples of the two Remarkable *Sponsions* made at *Caudium*, and *Numantia*. But this is always to be laid down as a Maxim, that no *Sovereign* is obliged at all to any Party. And therefore it was very well said of *Posthumius* to the *Romans*, *You have promis'd the Enemy nothing; nor have you ordered any of your Citizens to engage for you; and therefore you have nothing to do with us, to whom you gave no Order; nor with the Samnites, with whom ye made no Agreement.* And again, *I absolutely deny, that any Contract can oblige the People, which is made without their Order.* Nor is it with any less Judgment and Reason said, that if the People can be thus oblig'd to any one thing, they may be so to all.

2. And therefore they are neither oblig'd to make every thing good, nor to put Affairs into the same Posture they were in before. But if the Sam-

XVI.

How far the Sponsors are obliged, if what they undertake for be disallow'd; where also of the Caudine Engagement.

Numantines would have any Dealings with the People of Rome, they should have kept their *Army* within the Straits of *Caudium*, and have sent *Embassadors* to Rome, to treat with the *Senate* and *People* concerning a *League* and a *Peace*, that they themselves might have judged, how much the *Safety* of the *Army* concerned them. And then if they had not stood to their Agreement, they might justly have said what *Velleius* relates that the *Numantines* alledged, that the Violation of the publick Faith was not to be expiated by the Blood of a single Person.

3. It may with more Equity be said, (b) that the whole *Army* was obliged by that Agreement, and certainly this would be entirely just, if the *Sponsors* made the Contract by their Order, and in their Name, as we read that was which *Hannibal* made with the *Macedonians*. But if the *Samnites* were contented with the Word and Honour of (c) the *Sponsors*, and (d) the six hundred which they desir'd for *Hostages*, they might e'en thank themselves. On the other hand, if the *Sponsors* had pre-

(b) *That the whole Army was obliged by that Agreement.*] So the *Numantines* thought it equitable that, if the Engagement was not approved of, the *Army* which was set at Liberty upon that Engagement should be deliver'd up to 'em.

(c) *The Sponsors.*] These were two *Consuls*, two *Quaestors*, four *Prefects*, and twelve *Tribunes*, as *Appian* relates it. These were all by the Treaty of *Caudis* surrender'd; but by the Treaty of *Numantia* only one *Consul*, the rest were spared on the Account of *Tiberius Gracchus*, as *Plutarch* says in the Lives of the *Gracchi*.

(d) *The six hundred which they desired for Hostages.*] *Pomilius* the Son, in *Appian*, τῶν τε ἰππέων &c. I'll pick out some of the Principal Horse for Guarantees and Hostages of these Articles, till the whole Body of the People ratifie and confirm 'em. The Portuguese in a like Affair judged it sufficient that the Hostages were left to the Discretion of him who had 'em in his Custody. *Mariana* 21. 12. If they accept of those who are delivered up to 'em, they are look'd upon to remit eu'ry other Penalty. *Polybius* excerpt. 122.

pretended to have had a *publick* Commission for contracting with them, they had then been obliged to have made *Restitution* and *Satisfaction* for the *Damage* occasioned by their *Fraud*. But if that did not appear, they were then obliged to make good what the other Party might reasonably be suppos'd to have suffer'd on the Account of not *ratifying* the Treaty. And in this case not only their *Bodies* but also their *Estates* would have been obliged to the *Samnites*, unless some *Penalty* had been particularly express'd in that Agreement in lieu of it. For as to *Hostages*, it was positively agreed, that they, if the Treaty was not confirm'd and comply'd with, should answer it with their *Heads*. But whether the same Punishment was to be inflicted on the *Sponsors*, is what we are in the *Dark* about. For when the *Penalty* is stipulated after such a manner, the Result of it is this, that if the *Fact* engag'd for cannot be performed, nothing else can be *demanded* from that Obligation; because in this case, something that is *certain* is agreed on, instead of some uncertain Advantage that might possibly accrue. And it was the general Opinion of those Times, that ones *Life* might lawfully be engag'd on such occasions.

4. But among us who think otherwise, 'tis my Sentiment, that to satisfy what the People would not grant, the *Estates* of the *Sponsors* should be sold; and if that were not enough, their *Persons* obliged to *Slavery*. (e) *Fabius Maximus*, when the *Senate* refused to *ratify* an Agreement made by him with the *Enemies*, sold his own Land for two hundred thousand *Sesterces*, and so discharged

A a 3

charg'd

(e) *Fabius Maximus*.] Diodorus Siculus in Excerpt. Peires, Valerius Maxim. 4. c. 8.

charg'd his Promise. But the *Samnites* very justly order'd that (f) *Brutus Papius*, who had broke a Truce, should, *Body* and *Goods*, be deliver'd up to the Enemy.

XVII. —
Whether a
Sponſion or
Engagement
not diſap-
prov'd of,
does by its
being known
and paſſ'd
over in Si-
lence lay an
Obligati-
on; this ex-
plain'd with
ſome Di-
ſtinctions:
Where alſo of
Luſtatiuſ's
Treaty.

XVII. 1. Another Question is, whether if the *Sovereign Power* be acquainted with the Agreement, and yet is ſilent, it ſhall not be oblig'd to ſtand to it. Here we muſt firſt diſtinguiſh, whether the Agreement were *purely* and *ſimply* made, or whether upon the Condition of its being ratified by the *Sovereign Power*; for if it were *Conditional*, that *Condition* not being performed, the *Sponſion* is of no force. Like that of *Luſtatiuſ* with the *Carthaginians*, which the People of *Rome* declared was not made by their *Order*; and therefore another League was made over again by *publick* Conſent.

2. In the next place we ſhould know, whether any thing were acted by the *Decree* of the People, which might probably imply their *Acceptance* of the Agreement; for *Silence* alone is not enough to prove a *Conſent*, without ſome *Thing* or *Deed*, which probably would not have been, if that Agreement had not been *approved of*, as we have declared already, when we treated of relinquishing a *Property*. But if any ſuch Acts happen, which cannot probably be referred to another Cause, then it may juſtly be ſuppoſed to be ratified, as *Cicero* for *Balbus* well obſerves in the caſe of thoſe of *Cadiſ*.

3. The *Romans* pleaded *Silence* againſt the *Carthaginians*, upon the Agreement made by *Aſdrubal*; but becauſe it was expreſs'd in *Negative Terms*, That the *Carthaginians* ſhould not paſs the *River Iberus*, it could ſcarcely be allowed, that

a

(f) *Brutus Papius*.] Dion excerp. legat. 5.

a bare Silence should be enough to *ratify* another's Fact, since no Act properly theirs could follow, till some *Carthaginian* attempting to pass that River, should be forbid by the *Romans*, and should obey accordingly. For such an Act has the force of a *positive* Act; nor must it be reckoned among such as are merely Negative. Now if that Agreement made with *Lucretius* had consisted of many parts, and it had always appeared, that the *Romans* had observed the other Parts, tho' deviating from common Right, this had been Conjecture enough to prove, that the *Agreement* was firmly Ratified.

4. It now remained, that we should speak of such Agreements, as *Officers* and *Soldiers* make among themselves, not concerning those things which belong to the *Sovereign* Power, but such as relate to their own *private* Affairs, which are *allowable* for them to do one to another. But we shall have a better Opportunity to treat of these when we come to the *Incidents* of *War*.

C H A P. XVI.

*Of Interpretation, or the way of explaining
Difficult and Ambiguous Terms.*

I. 1. IF we respect the *Promiser* only, he is obliged to perform freely what he was willing to be oblig'd to. *When you promise, says Cicero, we must consider rather what you mean, than what you say.* But because *inward* Motives are not in themselves discernible, and there would be no *Obligation* at all by *Promises*, if every Man were left to his Li-

I. How Promises do outwardly oblige.

erty, to put what *Construction* he pleased upon them, therefore some certain *Rule* must be agreed on, whereby we may know, what our *Promises* oblige us to; and here natural *Reason* will tell us, that the Person to whom the Promise is given, has a Power to force him who gave it, to do what the strict Import of the words of his Promise does suggest. For otherwise no Business could come to a Conclusion, which in *Moral* things is reckon'd *impossible*. Perhaps it was in this Sense, that *Isocrates* treating of Agreements in his Prescription against *Gallimachus* said, τὸ τῶν νόμων κοινὸν πάντες ἀνθρώποι διαλέσμεν χρήμερον, (as the learned *Peter Faber* has judiciously corrected that Passage) *We always make use of this Law, as a Law that's common to all Mankind, not only we Greeks, but the Barbarians too, as the same Author had a little before express'd it.*

2. And to this agrees that Clause in the Ancient Form of *Leagues* mention'd by *Livy*, without any Trick or Collusion, (a) just as the words are now us'd and understood. The best Rule of Interpretation is that which guesses at the Will by the most probable Signs, which Signs are of two sorts, Words, and other Conjectures; which are sometimes considered separately, sometimes together.

II. If no Conjecture guides us otherwise, the Words are to be understood according to their Propriety, (not the Grammatical one, which regards

II. Words to be understood, as commonly taken, unless there are good Conjectures to the contrary.

(a) Just as the Words are now used and understood.] The Hebrews upon the 30th of Numbers observe, that Vows are to be interpreted as they are commonly taken.

(b) Not the Grammatical one, which regards the Etymon and Original of 'em.] 'Tis very well remarked by *Procopius*, *Pandul.* 1. where he treats of the Word *Confederates*, that, τὰ ἑαυτῶν τὰς ἀρμονίας &c. Time does not mind to keep up the same Denominations that were at first imposed; but even things themselves are turned and

gards the *Etymon* and *Original* of 'em, but what is *Vulgar* and most in Use; For

Use is the Judge, the Law and Rule of Speech. Rosc.

And therefore it was a foolish pitiful Shift that (c) the *Locrians* made use of, when, having put some of the *Enemies Mould* into their *Shoes*, and carrying some *heads* of *Garlick* privately on their *Shoulders*, they swore they would keep the *Articles* of the *Treaty*, as long as they carried those *Heads* on their *Shoulders*, and trod on that *Earth*, and then threw the *Earth* out of their *Shoes*, and the *heads* of *Garlick* from their *Shoulders*, as if by that poor means they were *absolved* from their *Oaths*; which Story is in *Polybius*. We have also several Examples of the like Treachery in *Polyænus*, which there is no occasion to mention because no Body doubts 'em. But *Cicero* well observed, that this is not the way to *prevent* Perjury, but to *confirm* it.

III. (d) But *Terms* of *Art*, which the common People are very little acquainted with, should be understood as explained by them who are most experienced in that *Art*, as what *Majesty* is, what *Parricide*, which the *Professors* of *Oratory* refer to stated *Distinctions*. For as *Cicero* says in his first of the *Academics*, *The Terms of Logick are not common words, but peculiar to that Subject, as indeed*

III. *Terms of Art are to be explained according to the respective Art they belong to.*

are

and alter'd just as People please, without any regard to what they were formerly called.

(c) *The Locrians.*] *Polybius* l. 12. just as the *Boeotians*, who promising to restore a City, did restore it. not standing, but ruined and demolished, *Thucyd.* 5. and as *Sultan Mahomet*, who having taken *Eubæa*, cut a Person in pieces, whose *Head* he had promised should be safe.

(d) *But Terms of Art.*] *St. Austin* in *Rhetoric*. As *Artizans* and *Mathematicians*, as well as *Philosophers*, give Names to several new things, we must understand these Names not so much from the *Vulgar* Acceptation of the Words, as in regard to the *Nature* and *Circumstance* of the *Precept*.

are the Terms of almost every Art. So when in Leagues the word *Army* is used, it is to be understood of such a number of *Soldiers*, as durst publicly invade another's Dominions. For *Historians* generally distinguish between those who plunder a Country privately, like *Robbers*, and those who do it openly, with a real Army. Wherefore the best way to judge what numbers make an Army, is by the strength of their Enemies. *Cicero* reckons six Legions with their *Auxiliaries* an Army. *Polybius* said a compleat Roman Army was 16000 Romans, and 20000 Allies, but a less number may sometimes do it. *Ulpian* calls him a General, who commanded tho' but one Legion with its Auxiliaries; that is, as *Vegetius* expounds it, 10000 Foot, and 2000 Horse. And *Livy* makes a just Army 8000; the like may be said of a Fleet. So (e) a Fort is a Place so fortified, as to be able to keep off an Enemy's Army for some time.

IV. We use Conjectures where words are ambiguous or seem contradictory, or because such Conjectures do naturally offer themselves to us.

IV. 1. Conjectures are necessary when Words or Sentences, are πολύσημα of many significations, which the Rhetoricians call ἐξ ἀμφιβολίας, Doubtful and Ambiguous. But the Logicians are nicer in their Distinctions; for if a word can have several significations, they call it ὁμωνυμία, an Equivocation, if a Sentence ἀμφιβολία, an Ambiguity. And we must also use Conjectures, when in any Contrasts there is ἐναντιοφάνεια, a seeming Contradiction. For we must needs have recourse to Conjectures, when several parts seem to clash with one another, in order to reconcile them if we can; but if that cannot be, then the last Clauses, which the Contractors agreed on, shall set aside the former.

(e) A Fort is a Place so fortified, as to be able to keep off an Enemy's Army for some time.] Servius upon the 1st Aeneid, Arces (Forts) are so call'd from arcea to repel, because an Enemy is repulsed from thence, that is, is hinder'd and kept back.

former. Because it is impossible, that at one and the same time a Man can intend *two* Contraries; and it is so much the very *Nature* of Acts which depend upon the *Will*, that we may at any time by a *new* Act of the Will go off from 'em either on *one* side only, as when a *Law* or a *Testament* is revok'd by him who made it; or on both sides where the Consent of several is requir'd, as in *Contracts* and *Agreements*. This the *Rhetoricians* call $\xi\ \alpha\nu\tau\nu\omicron\mu\iota\alpha\varsigma$, a *contrariety of Laws*. In which Cases the evident *Obscurity* of the Words justifies our Recourse to *Conjectures*.

2. And sometimes the *Conjectures* themselves are so plain, that they carry us to a *Sense* contrary to the more common Acceptation of the words. This the *Greek* Orators call $\omega\epsilon\rho\iota\ \rho\eta\tau\epsilon\ \kappa\ \delta\iota\alpha\phi\omicron\iota\alpha\varsigma$, the *Letter* and the *Design*, the *Latin* ones *ex scripto & sententia scripti*, from the writing, and the meaning of the writing. The *Principal Heads* from whence these *Conjectures* arise, are the *Matter*, the *Effect*, and the *Circumstances* or *Connexion*.

V. First (f) from the *Matter*, as the word *Day* (if a Truce be made for thirty Days) ought not to be understood of *natural* Days, but of *Artificial* ones, as agreeable to the *Subject-matter*. So the word *Grant* is taken for *passing a thing by*, according to the Nature of the *Affair* 'tis employ'd in. So the word *Arms* sometimes signifies *Instruments* of War, sometimes *armed Soldiers*, and is to be interpreted either in this or that *Sense*, as the matter in hand requires. So he who has promised to *restore* Men, must restore 'em *living*, and not *dead*; not to trick and *cavil* as the *Platæans* did.

V. From the Subject Matter.

(f) From the Matter.] *Tertullian* de pudicitia. An Expression must be understood according to the Nature of the Subject spoken of. He has the same in his Book de resurrectione Christi.

did. So when People are required to lay down their *Iron*, (*Ferrum*) they satisfy the Order, if they lay down their *Weapons* without their *Buttons*, as *Pericles* with his *Shifts* and *Quirks* pretended. And by a *free* going out of a *City*, is meant a *safe Conduct*, contrary to what *Alexander* did. And by leaving *half* the *Ships*, is meant *half* of the *number* of the *Ships*, *whole*, not *cut in two*, as the *Romans* basely dealt with *Antiochus*. The same Judgment may be form'd in other like Cases.

VI. From
the Effect.

VI. Secondly, from the *Effect*, where the main thing to be observ'd is, whether if the word taken in its common Sense does produce an *Effect* contrary to *Reason*: For where a word is *Ambiguous*, we must rather take it in that Sense which is liable to no Exception. It was then an idle *Cavil* of *Brasidas*, who having promised to *depart* out of the Land of the *Bæotians*, said afterwards, that the Place where his *Army* was encamped, did not belong to the *Bæotians*, as if his Promise had referred to the *Possession* which the present Fortune of War had given him, and not to the *ancient Limits* of the *Bæotians*; in which sense the *Agreement* it self had been void.

VII. From
the Circum-
stances and
Connexion;
either the
original Oc-
casion of
speaking,
or the Place
where spo-
ken.

VII. Lastly, from (g) the *Circumstances* and *Connexion*; the *Original Occasion* of the words, or the *Place* where they were spoken. Words are in their *Original Occasion* connected, which proceed from the same Will, tho' deliver'd perhaps in some *other Place*, or upon some *other Occasion*; and

(g) The *Circumstances* and *Connexion*; the *Original Occasion* of the Words, or the *Place* where they were spoken.] St. *Austin* against *Adamantius*, c. 4. excellently well observes, that they pick and cull out little *Scraps* of *Scripture* to impose upon the *Ignorant*, without taking together what goes before, and what follows, which would let 'em into the *Meaning* and *Design* of the *Writer*.

and from hence arise our Conjectures; for in a dubious case, the Will is presumed to be Consonant to itself. Thus in *Homer*, what *Menelaus* and *Paris* concluded on, that *Helena* should be the Conqueror's, must be so explain'd from the Consequence of things, that the Conqueror should be he who killed the other. And *Plutarch* gives the Reason *ὁ δὲ ἀμασὶ τῷ ὑποδ'εν &c.* Judges are guided by that which is plain, letting what is obscure and less evident quite alone.

VIII. Among the Circumstances of Place, the principal and most weighty (*b*) is the Reason of the Law, which some confound with the Intent of it; whereas it is but one of those Signs, by which we trace out the Intent of the Law. Now of all Conjectures this is the strongest, when it manifestly appears, that the Will was moved to such a thing by some one Reason as its only Cause; for there may often be many Causes, and sometimes the Will by vertue of its Freedom, without any Reason at all determines, and this is sufficient to create an Obligation. Thus a Present, or Deed of Gift, made in Prospect, and on the Account of Marriage, is revocable and void, if no such Marriage does ensue.

VIII. To this belongs that Conjecture which is drawn from the Motive, and when and how this Conjecture is of Service.

IX. But we must know that many Words have several Significations, one more strict and precise, the other more loose and extensive, which may happen upon several Accounts, either because the

IX The Distinction of Significations into such as are loose and extensive, and such as are strict and precise.

(*b*) The Reason of the Law.] Cicero in the behalf of *A. Caelina*: There's no great difference in the Reason of the thing, but only in the manner of it whether I am dispossessed by your Agent, he who is the stated and universal Agent of every Body, who is out of Italy and Abroad on the Government's Account, a sort of Lord and Master, that is, one who manages and acts uncontrolably in Right of some other; or by your Tenant, or Neighbour, or Client, or Freeman, or any other Person whatever, who has done me this Injury and Diservice by your Order, and in your Name.

Name of the *Genus* is peculiarly apply'd to one of the *Species*, as in the Words *Cognition* and *Adoption*; and in Nouns of the *Masculine* Gender, which are taken for the *Common*, where the *Common* is wanting; or because *Art* allows a *Term* a less confin'd Signification than *vulgar Use* indulges. As (i) *Death* in the *Civil Law* extends to *Transportation*, or *Banishment*, whereas in the common Acceptation it signifies quite another thing.

X. The Distinction of Promises into favourable, odious, and mixt or middle ones.

X. We must also observe, that of things promised some are *Favourable*, others *Odious*, and others of a *mixt* or *middle* Nature. The *Favourable* are those that carry in them an *Equality*, and respect a common Advantage, which the farther it extends, the greater is the *Favour* of the *Promise*, as in those that make for *Peace*, the *Favour* is greater than in them that make for *War*; and a *Defensive War* has more *Favour* allow'd than one commenced upon any other Motive. Others are *odious*, such as those that lay the *Charge* and *Burden* on one Party only, or on one more than another; and those which carry a *Punishment* along with 'em, which *invalidate* some Acts and *alter* others. And if any be of a *mixt* Nature, as *altering* something indeed of the former Constitution but yet for the sake of *Peace*, it shall according to the greatness of the *Good*, or the *manner* of the *Alteration* be reputed sometimes *favourable*, sometimes *odious*, yet so that if other Circumstances are equal, the *favourable* shall have the Preference.

XI. The difference between Contracts due in Equity, and such as are due in strictness of Law, rejected, as to the Acts of States and Princes.

XI. The *Difference* of Acts due in *Equity*, and those due in *strictness* of *Law*, if we mean only the *Roman Law*, does not belong to the *Law of Nations*;

(i) *Death in the Civil Law extends to Transportation.*] See Guicciardin. l. 16. where there's a Discourse about some Agreements of Charles the fifth relating to the Dutchy of Milan.

tions; but yet may they in some Sense be properly enough referr'd hither; as for Instance, if in any Countries there be some *Acts* which have one certain *common* Form; that Form, as far as it is not changed, may be understood to be in the *very* Act itself: But in other Acts which are in themselves *indefinite*, such as a Free *Donative*, or a Free *Promise*, we should stick closer to the Words.

XII. 1. These things premised, we must observe these following Rules; in Cases not *odious* we must understand the Words in their *full* Propriety, as they are *generally* taken; and if they are *ambiguous*, then they must be took in the *largest* Sense, as the *Masculine* is to be taken for the *common* Gender; and an *indefinite* Expression shall be understood *universally*. Thus these Words, *unde quis dejectus est*, from whence a Man has been ejected, shall be extended to the restoring of him who is by Force and Violence kept out and hindered from coming to his own; for the Expression in its largest Sense will admit of this Construction, as *Cicero* pleads in his Oration for *Cecina*.

2. In a matter of *Favour*, if he who speaks be *versed* in the *Law*, or speaks by the Advice of those who are, the Words shall then be taken in their larger Sense, so as to include that Signification also which is us'd amongst the Lawyers, or which the *Law* has impos'd upon 'em. (k) But we are not to run to Significations evidently *improper*, unless otherwise some gross *Absurdity* would follow, and the *Agreement* it self would be to no Purpose. On the other hand, Words are to be taken even more *strictly* than the *Propriety* will bear, if

XII. Out of these Distinctions some Rules are formed, that may direct us in our Interpretations of the Meaning of Words and Promises.

(k) But we are not to run to Significations evidently improper, unless otherwise some gross Absurdity would follow, and the Agreement is self would be to no purpose] See an instance of this in l. cum virum. C. de Fidei commissis.

if it be necessary in order to avoid an *Injustice*, or an *Absurdity*; and without such a *Necessity*, if there be a manifest *Equity*, or *Advantage* in the *Restriction*, we are to confine our selves within the narrowest bounds of their *Propriety*, unless *Circumstances* persuade us otherwise.

3. But in an *Odious* matter, even a *Figurative* Speech is allowed to avoid a *Grievance*: Therefore in a *Donation*, and when a Man recedes from his *Right*, tho' the Words be *general*, yet are they usually confin'd to those things only which were probably then thought of. And in things of this kind, that is sometimes understood to be really *ours*, which we have only *hopes* of keeping. Thus a Body of Troops promised by *one* Party only, is presumed to be raised at the Charge of that Party which desires it.

XIII. 1. 'Tis a remarkable Question, whether by *Allies* are meant those only who are so at the making of the League, or they also which come in afterwards; as in that *League* made between the *Romans* and *Carthaginians* after the *Sicilian War*, where it was agreed, *That the Friends of the one should not be molested by the other*. Hence the *Romans* inferred, that tho' the *League* made with *Asdrubal* of not passing the *River Iberus* was of no Advantage to them, because the *Carthaginians* had not sign'd it, yet if the *Carthaginians* should approve it, and countenance the fact of *Hannibal*, in besieging the *Saguntines*, whom the *Romans* after that *Treaty* had taken into the *Confederacy*, they might justly declare *War* against them, as *Violators* of their *League*. *Livy* sets down the Reasons thus, *The Security of the Saguntines was sufficiently provided for, the Friends on either side being excepted; for neither they who were then so, (1) nor those who should*

(1) Nor those who should afterwards be admitted.] Which Clause was added in the *Peloponnesian Treaty of Peace* made between the *Lacedemonians* and the *Athenians*. *Thuc.* l. 5.

should afterwards be admitted were specify'd at all. And since it was lawful for them to admit new Confederates, who could think it reasonable, either that no People should be received upon any Merit whatsoever, or that being received, they should not accordingly be defended? Provided still, that none of the Allies of the Carthaginians should be either tempted to revolt, or received into Protection if they voluntarily did so? Which seems to be taken almost word for word out of *Polybius*. What shall we say to this? The word *Friends*, no doubt of it, might with the greatest Justness and Propriety of Speech, admit both that *stricter* Signification which imported those who were actually so at the Time of the Treaty, and also that *larger* one which comprehended those too who should hereafter become so. But which of these Interpretations is the better, may easily be discover'd from the *Rules* before-mentioned, according to which we say, that *Future Friends* were not imply'd, because the Debate here is about *breaking the League*, which is an *Odious* matter, and about the depriving the *Carthaginians* of their Liberty of bringing those by Force of Arms to Reason, who were believ'd to have injur'd 'em; (m) a Liberty which by the Law of Nature was their Due, and therefore not rashly to be supposed *Forfeited and Lost*.

VOL. II.

B b

And

(m) A Liberty which by the Law of Nature was their due, and therefore not rashly to be supposed forfeited and lost.] The Romans to the Samnites who had a mind to invade the Sidicines, and ask'd the Romans leave to do it, made this Answer, There was nothing Stipulated that could hinder the Samnites from the Privilege of Peace or War. *Livy*, 1. 8. And so 'tis a Clause in the Treaty of *Antiochus*, If any of the Romans Allies shall take upon 'em to attack *Antiochus*, let him be at Liberty to repel the Violence; provided, that he does not by the Right of War seize upon any of their Cities, nor contract any Friendship with 'em, *Livy* 38. *Polybius* in exc. lega: 35.

2. And why was it not lawful then for the *Romans* to make an *Alliance* with the *Saguntines*, or not to defend them after they had done it? Yes, certainly they might, not by Vertue of the *Treaty*, but by the *Law of Nature*, which that *Treaty* had not *abrogated*. So that the *Saguntines* were in regard to *both Parties*, as if in that *Treaty* there had been no *Article* at all relating to *Friends*, in which Case the *Carthaginians* had done nothing contrary to the *Stipulation*, if they employ'd the *Arms*, which they look'd upon to be highly *Just*, against the *Saguntines*, nor the *Romans* if they defended 'em. As in *Pyrrhus's Time*, when it was agreed between the *Romans* and the *Carthaginians*, that if either of the *two People* should enter into an *Alliance* with *Pyrrhus*, it should be with the *Reserve*, of having the Power and Freedom to send Assistance to that State which *Pyrrhus* should attack. I do not say that the War on both sides in this case could be *just*; (n) but I deny that this was any Violation of the *League* in so doing. As *Polybius* rightly distinguishes concerning the *Succours* sent to the *Mamertines*, whether it were *just*, or whether the *League* would allow it.

3. And this is what the *Corcyreans* tell the *Athenians* in *Thucydides*, that notwithstanding their *League* made with the *Lacedemonians* they might send them *Succours*, because they were allowed by that *League* to form any new *Alliances* when they pleased. And the *Athenians* afterwards took that Advice, commanding their *Troops* not to fight against the *Corinthians*, unless they saw them going to

(n) I deny that this was any Violation of the *League*] Procopius Persic. 2. ἐφασκε τε ως αὐτὸς ἔλεγε &c. He asserted that he had no ways infring'd any Articles that were between the Persians and the Romans, because neither of 'em had inserted him in 'em.

to invade the *Corcyreans*, or their *Territories*, and this they did that they might not violate the *Treaty*; but it is no ways contrary to, or incompatible with a *Treaty* of Peace, to defend those who are injured by others, (o) so long as the *Peace* is in other *Respects* maintained. *Justin* writing of those times, says the *Athenians* broke that *Truce* in *Favour* of their *Allies* which they had made in their own *Name*, as if they would contract less *Perjury* by helping their *Allies*, than by engaging in open *War* themselves. We meet with the very same thing in one of *Demosthenes's* *Oration*s concerning the *Isle* of *Halonefus*, where it appears, that by a certain *Treaty* of *Peace* between the *Athenians* and *Philip* it was stipulated, that the *Cities* of *Greece* that were not included in that *Treaty*, should be left to their own *Liberties*; and that those who were included in it, might, if they were invaded, help 'em if they would. This is an Instance of an *Alliance* upon equal *Terms*.

XIV. We shall here give an Instance in unequal Leagues; as suppose it be stipulated that one of the *Confederates* shall not make *War* without the other's *Consent*; as we took Notice before, that it was agreed on between the *Romans* and *Carthaginians* after the second *Punic War*, and also in the *League* between the *Romans* and the *Macedonians*, before the *Reign* of *King Perseus*: Now since under the *Notion* of making *War*, all *Wars* may be comprehended as well *Defensive* as *Offensive*: In this dubious Cause we must take the *Expression*

XIV. How it is to be understood, that one Party shall not make War without the other's leave,

B b 2

in

(o) So long as the *Peace* is in other *Respects* maintain'd.] Thus after the *Times* mention'd there, the *Corcyreans* decreed, Ἀθναίοις μὲν &c. that they would indeed, according to their *Agreement*, assist the *Athenians* with their *Troops*, and yet still be *Friends* to the *Peloponnesians*.

in its *stricter* Sense, lest our *Liberty* be too much restrain'd.

XV. *About the words, that Carthage shall be free.*

XV. What the *Romans* promised (*p*) that *Carthage* should be free, is of the same kind, tho' it could not reasonably be understood of *absolute Liberty* from the *Nature* of the *Act*, (for they had long before lost the *Right* of *making War*, and several other *Privileges*) yet some sort of *Liberty* it left them, at least so much as not to be oblig'd by another's *Order*, to *change* and *translate* their *City*: It was then a false *Construction* which the *Romans* afterwards put upon that *Promise*, that by *Carthage* was meant the *Citizens*, not the *City* (which tho' improper, may however be granted, because of the *Attribute* *free*, which agrees rather to the *People* than to the *Town*.) For in the words, *to be left free*, *αὐτονομον*, *to enjoy their own Laws*, was a manifest *Sophistry*, as *Appian* says.

XVI. *What Treaties are to be esteem'd Real and what Personal; this explained by Distinctions.*

XVI. i. There is another *Question* which often arises, and may properly be refer'd to this *Chapter*, concerning *Contracts Real* and *Personal*. When we act with a *Free People*, no doubt of it the *Contract* made with them is in its own *Nature Real*, because the *Subject* is a thing *permanent* and *durable*: Nay, tho' that *Republican State* should be turned into a *Monarchy*, the *League* will hold good, because the *Body* of the *People* is still the *same*, tho' the *Head* be changed, and (as I said before) the *Sovereign Power* does not cease to be the *Power* of the *People*, because it is exercised by the *King*; we must except this *Case*, where it appears that the *Motive* for so doing was peculiar to that *Form* of

(*p*) That *Carthage* should be *Free*.] *Diodorus Siculus*, in his 27th *excerpt. legat.* relates this matter thus, νόμους, καὶ ἑαυτὸν, ἱερὰ, τοῖς θεοῖς, ἐλευθερίαν, that their *Laws*, their *Country*, their *Religion*, their *Sepulchres*, and their *Liberty*, should be continued to 'em.

of Government only, as when *free* Cities enter into an *Alliance* for the defence of their Common Liberties.

2. But if a *League* be contracted with a *King*, it is not therefore presently to be reputed *Personal*, for as it is well observed by *Pedius*, and *Ulpian*, the *Person* is often inserted in the *League*, not that the *League* is *Personal*, but to shew, by whom that *League* was made. If it be added to the *Treaty*, that it shall stand *for ever*, or that it is made for the *good* of the *Kingdom*, or with *him* and his *Successors*, for this Clause $\kappa\alpha\iota\ \tau\omicron\iota\varsigma\ \epsilon\iota\chi\theta\omicron\upsilon\iota\varsigma$, and to his *Posterity*, is what is usually express'd, as *Libanius* says in his Defence of *Demosthenes*, or if it be, for such a *limited* time, it will from hence fully appear, that the *League* is *Real*. Such does (q) the *League* between the *Romans* and *Philip* King of *Macedon*, seem to have been, which when *Perseus* his Son deny'd to be *Obligatory* on him, occasioned a *War*. There are also *other* words may prove a *League* to be *real*, and sometimes the *Matter* it self will afford a *Conjecture* not altogether improbable.

3. But when the *Conjectures* are *equal* on both sides, all that we have to do, is to conclude, that those *Leagues* which are *favourable*, are *real*; and that the *Odious* are *Personal*. *Treaties* made for the *Preservation* of *Peace* and *Commerce* are *Favourable*, nor are those for *War* always *Odious*, as some think, but the $\epsilon\pi\iota\mu\alpha\chi\iota\alpha\iota$, that is, such as are enter'd into for *mutual Defence*, come nearer the *favourable*; $\epsilon\upsilon\mu\alpha\chi\iota\alpha\iota$, or *offensive*, nearer the *Odious* and *Burdensome*. Besides in a *Treaty* that al-

B b 3

lows

(q) The *League* between the *Romans* and *Philip* King of *Macedon*. *Livy*, l. 42. 'Tis presum'd that a regard is had to the *Prudence* and *Honesty* of the *Person* one's treating with. See *Paruta*, l. 5, and 7.

lows *any* War, 'tis presum'd that a Regard was had to the *Prudence* and *Honesty* of him with whom it was made, as being a Person not thought capable of engaging either in an *unjust* or a *rash* War.

4. And whereas it is said, that *Societies* are dissolved by *Death*, I do not say any thing of that here, for this belongs to *private* Societies, and depends upon the *Civil Law*. And therefore whether (r) the *Fidenates*, (s) *Latins*, *Hetrurians*, and *Sabins* did right or wrong, in going off from their *League*, upon the Death of *Romulus*, *Tullus*, *Ancus*, *Priscus* and *Servius*, cannot properly be determined by us, because the *words* of the *League* it self are not extant. Not much different is that Controversie in *Justin*, whether the *Cities* which had been *Tributary* to the *Medes*, did upon the change of the *Empire* change their *Condition*; for we must consider whether in that Convention they had particularly made choice of the Protection of the *Medes*. But *Bodine's* Argument is by no means to be allow'd, that the *Leagues* of *Princes* do not oblige their *Successors*, because the Force of an *Oath* extends no farther than the Person of him who takes it. For the *Oath* may bind only the *Person*,

(r) *The Fidenates.*] See *Dionysius Halicarnassensis*, l. 3.

(s) *Latins.*] The same Author in his 3d B. mentions the *Appulians* and the *Latins*; and in his 4th. *Turnus Herdonius*, and the *Latins*. *Ammianus*, l. 26. The King of Persia seiz'd upon the *Armenians*, endeavouring, but unjustly, by Force of Arms, to bring 'em again under his Jurisdiction; pretending, that after the Decease of *Jovian*, who was the Person he had concluded the League and Peace with, nothing ought to hinder him from recovering what he could prove belong'd to his Ancestors. See such another Instance of *Justinian's* Treaty with the *Saracens* in *Menander Protector*. Add to this what the *Switzers* plead after the Death of *Henry the Third* in *Thuanus*, l. 97. Anno MDLXXXIX. See also a remarkable Passage in *Camden* at the Year MDLXXII. where he speaks of the Ancient League of the *French* with the *Scots*.

son, and yet the *Promise* that's along with it, may bind the *Heir*.

5. Nor is it true, what he takes for granted, that all *Leagues* are grounded upon *Oaths*, for generally speaking there is Power enough in the very *Promise* to bind, tho' for the greater Reverence and Solemnity, those *Promises* are confirmed by *Oaths*. When *P. Valerius* was *Consul*, the People of *Rome* had sworn to meet at the Summons and Order of the *Consul*; he dying, *L. Quintius Cincinnatus* succeeded him; and then some of the *Tribunes* took upon 'em to quibble, as if the People were no longer oblig'd by that *Oath*. Whereupon *Livy* gives his Judgment in the following Terms, *There was then none of that general Disrespect for the Gods which possesses the present Age: Nor did everyone, as now-a-days they do, make their Oaths and their Laws stoop to the Construction that best serv'd their turns; but rather suited and accommodated their Manners to them.*

XVII. And 'tis certain too, that a *League* made with a *King* is valid, though that *King* or his *Successor* be expelled the Kingdom by his *Subjects*; for though he has lost his *Possession*, the *Right* to the *Crown* still remains in him, according to that of *Lucan*, concerning the *Roman Senate*:

XVII. A
League with a King
remains
good, tho'
he be expelled
his Kingdom.

Non unquam perdidit Ordo
Mutato sua jura loco

Nor has the Order ever lost it's Rights
Upon any Change of Place.

XVIII. But on the other hand, if with the Consent of the *True King* we make *War* on an *Usurper*, or any other Person who oppresses a *Free People*, before that People has sufficiently decla-

XVIII.
But it does
not reach to
the Usurper
of the
Crown.

red their Approbation, we do nothing against any Article of *Alliance*; because (t) though they have got Possession, yet have they no Right. And this is what *T. Quintius* urg'd to *Nabis*: *We never enter'd into any Friendship or Confederacy with you, but what Engagements we have are with Pelops the Just and Lawful King of Sparta.* For in Treaties these Qualities of *Prince, Successor*, and such like, properly imply a *Right*, whereas the Term *Usurper* always imports an *Odious Cause*.

XIX. To whom the Promise is due, when made to him who shall first do such or such a Thing, if it be done by many at once.

XIX. 'Twas a Question formerly of *Chrysippus's*, whether a Reward promised to him who first gets to the Goal, and two get there together, is due to both, or else to neither. And here indeed (u) the Word *first* is ambiguous, for it may either signify him who out-runs all the rest, or him whom none out-runs. But because the Rewards of *Virtue and Excellence* are Things of a *Favourable Nature*, the Juster Opinion is, that they should share the Prize betwixt 'em. (x) *Scipio, Caesar and Julian*, acted more generously, in giving the entire Reward to each of those who had at one and the same Time scaled the Walls; and let this suffice for the Interpretation to be

(t) *Though they have got Possession, yet have they no Right.*] So *Valens* would not allow of the *Gothick King's* Excuse, who said that he had sent some Auxiliary Troops to *Procopius* who had *Usurp'd* the Imperial Dignity. *Ammianus* in his xxviii Book calls it a very Trifling Excuse. You have the same Story in the *Greek Writers*, but under the Name of *Scythians*, for so they call'd the *Goths*. So *Justinian* deny'd that he should break the Articles of Alliance made with *Gizerick* if he took up Arms against *Gelimer*, who had depriv'd *Ilderich*, the Rightful King, both of his Crown and his Liberty. See Cardinal *Fuschi*, pp. upon the Word *Tyrannus*. Concl. 306. n. 6. *Cacheranus*, decis. lxxix. n. 35.

(u) *The Word First is ambiguous.*] See *Alberick de Rosato de Statutis* qu. 106. 107.

(x) *Scipio.*] When he took new *Carthage* in *Spain*.

be given to the *proper* or *improper* Signification of Words.

XX. 1. There is also another way of interpreting by *Conjectures*, founded upon something else besides the *Signification* of the Words in which the *Promise* is express'd; and this is done *two* ways, either by enlarging or *restraining* 'em. But we have oftner less Reason to *enlarge* the *Sense* than to *restrain* it. For as in all Things, the want of any one *Cause*, is enough to *hinder* the Effect, whereas all must concur to produce it; so in an Obligation, that *Conjecture* that *enlarges* the Obligation is not rashly to be admitted, but with a great deal more Caution than in the Case above-mentioned, where Words are allow'd a *large* Signification, tho' that Signification is not so much in use; for here we look for a *Conjecture*, which the Words of the *Promise* don't directly imply, and therefore this *Conjecture* ought to be extremely certain, to form an *Obligation* from it. Nor will a *Parity* of Reason do here, but it must be exactly the *same*; nor is this always enough for such an *Enlargement*, because, as I said before, *Reason* does often so incline, as that the *Will* however is of it self a *sufficient* Cause without that Reason.

2. To justify then such an *Enlargement*, we ought to be sure that the *Reason* under which that *Case*, which we would comprehend, falls, was the only Cause and Motive that *inclin'd* the *Promise*, and that the Reason was in that *general* Sense considered by him; because otherwise the *Promise* would be either *unjust* or *useless*. This part is commonly treated of by the *Rhetoricians*, in the Place where they Discourse, *περί πρῆς καὶ διαβολῆς*, about the *Letter*, and the *Design*, of which they give us one Instance, and that is, when we always express the *same* Intention. And hither also that other

XX. A
Conjecture
freely offer-
ing is self
may either
enlarge the
Sense; and
when it
may do so:

Head

Head κατὰ συλλογισμόν, *about Reasoning*, may be referred, *where we gather*, as *Quintilian* says, *what is not written, from what is written*. And what the *Lawyers* teach us (y) of Things done fraudulently.

3. Take for an Example (z) an *Agreement* that such a Place should not be wall'd round, an *Agreement* made at a Time, when no other *Fortifications* were in use, that Place ought not to be inclos'd so much as by a *Pile of Earth*, if it appear that the only Reason, why *Walls* were prohibited, was to prevent its being fortified. Another Instance that is often brought, is of a Man, who supposing his *Wife* to be with *Child* at his Decease, disposes of his Estate to such a one, in case that *Posthumous Child* should die, which Clause may be extended also to signifie, or in case no such *Child* should be born, for 'tis plain, that the Reason why he did not absolutely make him his Heir, was because he thought he might have a *Child* of his

(y) Of Things done Fraudulently.] *Seneca* in his *exterp. controv.* vi. 3. has very well observ'd; that a *Circumscription* always Feels a Piece of *Roguery* upon you under the Appearance of Law; what you can discover is Lawful; what lies conceal'd is design'd to Trick you. *Quintilian*, *Contröv.* cccxlviii. For we never run to this Law, (*Circumscription* he means) but when a Just Right is shuffl'd out by some *Knavery* or other: You have a Precedent in *Pliny's Natural History*, l. xviii. Because by the Law of *Licinius Stolo* only 500 Acres were allow'd to any Man; and he himself was condemned upon his own Law, when he thought by the little shift of putting in his Son for a share, to get more into his hands. There's the same Story in *Valerius Maximus* viii. c. vi. 3. See another Instance in *Tacitus*, *Annal.* xv. of some pretended Adoptions. Another you have in *Emanuel Comnenus's* Novel, in the *Fus Græco-Romanum*.

(z) An Agreement that such a Place should not be wall'd round, an Agreement made at at a Time, when no other Fortifications were in Use.] *Fuscus Arellius* in *Seneca's* xth *Contro.* l. i i. For 'twas no doubt of it, the Intention of their Oaths, that they should not by any Violence be separated, when they so particularly took Care, that even Death should not divide 'em.

his own to inherit; and this is what we meet with not only among the Gentlemen of the Law, but also (a) in Cicero, and Valerius Maximus.

4. Cicero in his Oration for Cæcina argues this Matter thus. *What? Is this sufficiently provided for by the Letter? No. Upon what then do we proceed? The Design; which if it could be apprehended by Silence, we should not use any Words, but because that cannot be, Words were therefore found out, not to hinder the Will, but to declare the Intention.* And a little after in the same Oration he says, that where there manifestly appears but (b) one, and the same Cause of the Equity of it, that is, one and the same Motive, there also the Right is the same. So likewise the Interdict, *From whence you shall have ejected me by Force of Arms*, takes Place also against all manner of Violence, which affects our Life and Person, because such an Attempt, says he, is generally made by Force of Arms; but if by any other Means I am expos'd to the same Danger, the Law allows me the same Right. Quintilian the Father brings this Example in one of his Declamations, *Murder seems to imply the shedding of Blood by the Sword, but if a Man be killed by any other Means, we yet appeal to the same Law; for if a Man fall among Thieves, or be thrown into the Water, or tumbled headlong from a high Precipice, his Death shall be revenged by the same Law, as it would have been had he been killed with a Sword.* The same Argument is used by *Iseus*

(a) In Cicero.] De inventiones 11.

(b) One and the same Cause of the Equity of it.] So Philo in his Treatise de Specialibus legibus, that Adultery is committed with a Woman, who is only engag'd to some Body else, and for this Reason; αἱ δὲ ὁμολογίαι τοῖς γάμοις ἰσοδυναμοῦσι, because a Contract is as binding as a Marriage. So in the Mosaic Law under the Name of an Ox every Tame Animal is meant; and under the Title of a Pit, any Hole or Ditch, Exod. xxi. 28, 25. Chassanous Catalog. Glor. Mundi part. v. confid. 49.

Isæus in the Affair of *Pyrrhus's* Estate, where because by the Law of *Athens* a *Will* could not be made without the *Daughter's* Consent, he infers, that no more could an *Adoption* without her Consent.

XXI. Where also of executing an Order in some other manner than what was prescribed:

XXI. And from hence that Eminent *Question* in *Gellius* may easily be answered, about an *Order* or *Commission*; whether it may be executed, tho' not by the very same Method, yet by some other equally profitable, or perhaps more Advantagious than that which was prescrib'd: which may be done indeed if it be certain, that what was so prescribed was not prescrib'd under any precise Form, (c) but with some general View that may be done as well some other way; as was answer'd by *Scævola*, when he said, that he who has an *Order* to be the *Bail* and *Security* for another Person, may *Commission* the Creditor to lend that Person the *Money*. But if that does not sufficiently appear, we had much better observe what *Gellius* alledges there, that we quite set aside the Authority of him, who gives us our *Commission*, if instead of doing what we were order'd, *Punctually* and with what *Regularity* as we ought, we intermix our own *Prudence*, a *Prudence* that he never desir'd of us.

XXII. Or it restrains the Sense, and that either from some Original Defect in the *Will*, which is discover'd by the Absurdity of it:

XXII. The *Interpretation* that restrains the import of the Words *promising*, is fetcht either from an Original Defect in the *Will* of the *Speaker*, or from some Accident falling out *Inconsistent* with his Design. An Original Defect in the *Will* is discover'd,

(c) But with some more general View.] *Quintilian*, Controv. clvii. Servants do some Things more Freely upon a Principle of Honesty and Goodness; and even the Slaves we buy think it sometimes an Argument of their Fidelity, not to obey us. You have an Instance of this kind in excerpt. *legat.* in that part, which treats how *Embassies* are to be manag'd; and in what *John*, one of the *Justinian* Captains did contrary to *Bellisarius's* Orders, *Gothia*. ii. and iv.

ver'd, either from the *Absurdity* which would otherwise evidently follow, or upon failure of the *Reason* (*d*) which alone did fully and efficaciously move the *Will*, or from a *Defect* of the *Matter*. The first is grounded upon this, that no Man in his Wits can be supposed to intend Things that are *Absurd*.

XXIII. The second is grounded on this, that what is contain'd in the *Promise*, where such a particular Reason is added or plainly imply'd, is not considered simply in it self, but as it falls under that Reason.

XXIII. Or from the ceasing of the Motive:

XXIV. The third on this, that the *Matter* in hand is always presum'd to be in the *Mind* and *Thoughts* of the *Speaker*, though his Words seem to admit a larger Sense. This way of *Interpretation* too is placed by the *Rhetoricians*, under the Head *περί πρὸς ἡ διαβολῆς*, concerning the Letter and the Design, and is intitl'd, when the same Meaning is not always express'd.

XXIV. Or from a defect in the Matter.

XXV. 1. But we must observe in Relation to the *Reason* or *Motive* of the *Will*, that under it may be comprehended some Things not actually in Being, but only in a *Moral Possibility* of existing, and when this happens, no Restriction is to be allow'd: So should it be stipulated, that no *Army* or *Fleet* should be brought to such a Place, none ought to be brought thither, tho' there be no Intention thereby to do any harm, because in that *Agreement*, not so much any one particular Damage, as all *Dangers* and *Inconveniences* whatsoever are respected.

XXV. Observation on the Conjectures last mentioned.

2. 'Tis

(d) Which alone did fully and efficaciously move the Will.] An Example of this there is in l. Adigere. §. quamvis. D. de jure patronatus.

2. 'Tis also a very usual Inquiry, whether Promises are to be understood with this tacit Condition, *if things continue in the same Posture, they are now in*; this is what is not to be granted, unless it plainly appears, that that *present Posture* of Things was included in that one *only* Reason we were talking of; and we frequently read in Histories of *Embassadors*, who understanding that there was so great a Turn in Affairs, as would render the whole *Matter* and *Reason* of their *Embasse* void, have returned home, without opening their Commission at all.

XXVI. Or when some Accident happens inconsistent with the Speaker's Design: as when the Thing is unlawful:

XXVI. The Masters of the *Art of Speaking*, when an Accident is inconsistent with the Design and Intention, refer this also to the same Chapter *περὶ τῆς ἀναβολῆς*; and this *Inconsistency* is of two sorts, for the *Will* is discover'd, either by Natural Reason, or from some sign of the *Will*. *Aristotle*, who has very accurately handled this Part, thinks that, in order to make a Discovery from *Natural Reason*, the *Understanding* ought to be endued with *Prudence* or *Discretion*, (Virtues peculiar to it) and the *Will* with *Equity* and *Justice*, which he very wisely defines, a *Correction of that (e) wherein the Law, by its being too Universal, is defective*; which may also be apply'd to *Testaments* and *Contracts* in their Respective way. For since 'tis impossible to foresee and specify every Accident, there's a Necessity for reserving the Liberty of exempting such Cases, as the *Speaker* would, were he present, himself exempt; but this must not be done without Abundance

(e) *Wherein the Law, by its being too Universal, is defective.*] Seneca iv. Controv. 27. In the Law, you say, there's nothing excepted. But however many Things, which are not expressly excepted, are yet evidently imply'd to be so; the Letter indeed is narrow, but the Meaning extensive; and some Things are so very plain as to want no Exception at all.

bundance of Circumspection; for that would be to make one's self *Master* of another Man's *Design* and *Actions*, and therefore is not to be allow'd, but when there are sufficient and convincing Tokens for it.

2. One infallible *Token* that there ought to be such an *Exemption* is, when to adhere precisely to the *Letter* would be *unlawful*, that is, would be repugnant to the Laws of *God* or *Nature*. For such Things having no Power to *oblige*, are necessarily to be excepted: *There are some Things* (says *Quintilian*, the Father) *that are naturally exempted, tho' they are no ways compris'd in the Sense of the Law*. Thus he who has promised to restore a *Sword*, that was left him, ought not, if the Person be *mad*, to restore it, lest by so doing he endanger himself or some other Innocent Persons; nor are we to deliver a Thing to him, who *deposited* it with us, if the *Owner* demand it. *I approve* (says *Tryphonus*) *of that Justice that gives to every Man his own, but so as not to take from him, who has a better Claim to it*. The Reason is, because (as we observed elsewhere) such is the force of *Property*, that it is a manifest *Injustice*, not to return a Thing to the Right Owner, when-ever we know who that is.

XXVII. 1. Another *Token* of Restriction shall be this; when to stick close to the *Letter*, is not Absolutely, and of it self *Unlawful*; but when, upon considering the thing with Candor and Impartiality, it appears too *grievous* and *burthensome*. And this, either in respect of the Condition of *Human Nature* absolutely consider'd, or in regard to the Person and Thing in Debate, compared with the End to which such an Act is tending. Thus a Man who lends a thing for some certain time may demand it before that time, if he happens to be very much in want of it himself, because by the Nature of such a *Beneficial Act* no Man can be pre-
sumed

XXVII.

Or too Bur-
then some,
all Circum-
stances con-
sider'd.

sumed willing to serve his Friend to his own *extreme* Prejudice. So he who has promised an *Ally* the Assistance of his Troops shall be excused, if he be so far engaged in *War* at home, as to have occasion for 'em himself: And thus too (f) a Grant of *Exemption* from Taxes and Tribute must be understood of common Yearly Taxes only, and not of those *extraordinary* Subsidies which the pressing Necessity of Affairs may require, and which the *Public* cannot be without.

2. From hence it appears, that *Cicero* was too free in saying, *That such Promises are not to be kept as are of no Advantage to the Persons they are made to; nor if they do you more Harm than they do them Kindness.* For it is not for the *Promiser* to judge whether a thing be useful or not to the Person he has promised it, unless it be in a case of Madness, as we have observed before; nor is every Inconvenience of the Person *promising* sufficient to release him from his Promise; but it must be (g) such a one, as even from the very *Nature* of the *Act*, must be believed to be *excepted*; so he who has engag'd to work so many Days for his Neighbour, shall not be obliged to do it, if his *Father* or *Son* be taken dangerously ill: And this is what *Cicero* has excellently touched upon, when he says, *If you have given your Word to any one, that you will instantly appear in Court, and there manage his Cause* for

(f) *A Grant of Exemption.*] See *Rosenthalius de feudis*, c. 5. concl. 86. n. 2. *Heig. illustrium* 18. n. 16. part. 1. *Cothman. Conf.* 11. 32. *Clar. §. feudum* 29. 2. *Andrew Knich de vestitis pactis* 11. c. 5. n. 20. *Hen. Bocer de collectis.*

(g) *Such as even from the very Nature of the Act must be believed to be excepted.*] See *Charles Molinæus Coniur. Parisiensis* tit. 1. §. 2. gl. 4. n. 3. *Ferd. Vasquez. de Succession. Creat. l. n. §. 18. n. 80.* *Anton. Faber rer. in Sabaud. judicat.* l. 4. tit. 30. *Zassius in l. stipulatio hoc modo*, n. 3. de Verb. Obligat. Add c. *quemadmodum de jurejurando*, and *Aleiat, c. cum contingat*, intitled as before.

for him, and in the mean while your Son falls dangerous Ill, 'twould be no Breach of Duty in you not to perform what you promised.

3. And 'tis in this Sense, but we must not stretch it any farther, that we are to take (b) what we read in Seneca, *Then shall I break my Word, then shall I be justly charged with Levity, if, when all things continue in the Posture they were in at the time of my Promise, I do not perform it. For if there be any Alteration in the Circumstances of the Affair, it gives me a Liberty to determine anew, and discharges me from my former Obligation. I promis'd to be your Council; but afterwards I find that your Cause tends to the Prejudice of my Father. I promis'd to take a Journey with you; but they talk that the Roads are pester'd with Highway-men. I was just a coming to serve you, but my Child's fallen Ill, or my Wife's brought to Bed, and so I am detained at Home. All Things ought to be in the very same State and Condition they were in when I promis'd you, if you would oblige me to keep my Word. All things, I mean,*

VOL. II.

Cc

accord-

(b) *What we read in Seneca.*] Here's something else of the same Author's in his 39th Chapter of his 4th B. de beneficiis, I'll go to an Entertainment, tho' the Weather be Cold, because I have promis'd it. I'll rise to a Wedding, tho' I have not slept well or digested my Supper, because I have promis'd; but not if I've a Fever upon me. I'll be Bail for you, because I have promis'd you, but not if you bid me be Security for I don't know what or would bring me in Debt to the Government. There's always I say, a Tacit Exception in all these Cases, I'll do such and such a thing, if I can, if I ought, if Affairs are so and so. Put matters into the same Posture when you claim my Promise, as they were in when I made it. There's no Fickleness in my falling off, if any thing new and unexpected has happened. Why are you surpris'd that I should alter my Resolutions, when the Conditions of my Promise are altered? Make every thing the same it was before, and I am still the same. We promis'd to be bound for you, but we can't discharge our Promise. You must not blame every body who is worse than his Word; a greater Power excuses a Non-performance. The English often made use of this Evasion, (see Camden Ann, 1595) both in their Disputes with the Dutch and the Hanse Towns.

according to the Nature of the *Act* in Debate, as we just now explain'd it.

XXVIII.

And from
other Signs;
as when
some clash
and inter-
fere.

XXVIII. We told you that there are also some other *Signs* of the *Will*, from whence it may certainly be collected, that *such* and *such* a Case ought to be *excepted*. Among these *Signs* there's none more convincing, than when we find that the Words in *another* Place, though they are not directly *opposite* (for that would be the *ἀντιλογία* or *Contradiction* we mention'd before) do yet by some unexpected Turn of Things happen to *clash* and *interfere* in the present *Conjuncture*: This the Greek Rhetoricians call τὴν ἐν περιστάσεως μάχην, a *Circumstantial Disagreement*.

XXIX.

What Rules
are in such
a case to be
observed.

XXIX. 1. (i) *Cicero* from some Ancient Authors has, upon the Subject of this Dispute and Difficulty, laid down several Rules to know which Clause ought to prevail, and have the Preference, when the *Clashing* and *Contrariety* is by Accident: As these Rules are by no means to be slighted, so neither do they seem to me to be *rang'd* and *methodiz'd* as they ought. We shall dispose 'em in the following manner, (k) 1. *That which is only permitted must give place to that which is commanded*; for he who permits a thing seems to permit it only in case no other Obstacle intervene than what is then thought of; and therefore as the Author to *Herennius* says, An Order exceeds a Leave. 2. *What is to be done at a certain and prefix'd Time, must*

(i) *Cicero*.] De inventione l. 11. and *Marius Victorinus* there.

(k) *That which is only permitted must give place to that which is commanded*.] *Quintilian* Declam. 374. The Law which forbids is always more powerful than that which permits. *Donatus* upon *Phormio*, Act 1. Scen. 2. He says very well, Commands; for that Law which does only permit a thing has less Force with it, than that which Commands. See *Cicero Verrin*, 11. and what *Commanus* has, l. 1. c. 9.

must be preferr'd to what may be done at any Time: Whence it follows, that generally speaking a Contract which forbids is of greater force than that which commands, because what forbids binds at all times; but so does not what commands, unless it be either when the Time is *express*, or that the Command includes some tacit Prohibition. 3. In Covenants which are in the Respects before-mentioned equal; that which is most particular, and comes nearest to the matter in hand, must take place. For Particulars are commonly of more Efficacy than Generals; and the Prohibition which has a Penalty annexed, is to be preferred before that which has none; and that which has a greater before that which has a less. 4. What has either more honourable, or more advantageous Motives shall carry it. And in the last place, What is last spoken ought to be most regarded.

2. And here too we should repeat what was offer'd at above, that Agreements sworn to must be understood in their most usual Propriety and Meaning, and that all tacit Restrictions, and such Exceptions as are not absolutely necessary from the Nature of the thing, must be entirely excluded. And therefore if by Accident two Covenants, one upon Oath, the other not, clash and interfere, (1) that upon Oath shall be preferred.

XXX. 'Tis also a pretty pertinent Question, whether in a doubtful Case a Contract ought to be accounted perfect before the Writings are engrossed and delivered. For this *Muræna* alledged against the Agreements made between *Sylla* and *Mithridates*.

XXX. That upon a Scruple a Writing is not Essential to the Validity of a Contract.

C c 2

(1) That upon Oath shall be preferr'd] Acontius in Ovid.

The Father promis'd, and the Daughter swore
He unto Men, and she to Heaven, appeal'd:
This the Name of Perjur'd, that of Liar dreads,
And do you doubt which is the Juttter Fear?

dates. To me it is plain, that unless it be otherwise agreed on, (m) the *Writings* are to be deem'd as the Memorial only of the *Contract*, and not as any part of the Substance of it. For if otherwise, it is customary to express it as in the Truce with *Nabis*: *From the Day that these Articles when copied over are signify'd to Nabis.*

XXXI.
That the
Contracts of
Kings are
not to be in-
terpreted
by the Ro-
man Law.

XXXI. But I cannot allow their Opinion, who hold that the Contracts of *Kings* and *States* are to be interpreted, as much as possible, by the *Roman Law*, unless it appear, that among some People that *Civil Law* has, in such things as concern the *Right of Nations*, been received even for the *Law of Nations*; which is not to be presumed without very good Grounds.

XXXII.
Whose
Words are
most to be
observ'd,
whether his
who offers a
Condition.
or his who
accepts it;
this ex-
plained by a
Distinction.

XXXII. As to what *Plutarch* in his *Symposiacs* proposes, *Whether we are to regard his Words who offers a Condition, or his who accepts it, most*; for my part, I think, that since he, who *accepts* it, is in this Case the *Promiser*, his Words, if they be *absolute* and *without Reserve*, are what give Life and Birth to the Affair. For if they are only *Affirmative* with respect to the *others* Words, then according to the Nature of *Relative Terms*, his, who offers the Condition, shall be look'd upon as repeated in the Promise which the *Acceptor* makes. But 'tis certain, that before the Condition is accepted, he who

(m) *The Writings are to be deemed as the Memorial only of the Contract, and not as any part of the Substance of it.* J. L. in re, and l. si res gesta. D. de fide instrumentorum, l. pactum quod bona fide, c. de pactis. So *Bartolus*, *Johannes Faber* and *Salicetus*, whose Opinion prevailed in Court against *Baldus* and *Castrenses*, expound, c. de fide instrumentorum, the Law of Contract. *Mynfingerus* decad. 10. Conf. 91. *Neosad* de pact. antenuptial observ. 18. And therefore what *Ligniacus* produces out of *Guicciardin*, rer. Italic. l. 11. about an Instrument sign'd by the King, but not yet seal'd by him, nor with the Secretary's Hand to it, carries no great Authority with it, nor is the matter of Fact sufficiently proved,

who offer'd it, is no ways obliged; because there's yet no Right acquired, as is evident from what we said before in relation to a *Promise*. And this offering of *Conditions* is by far less binding than a *Promise*.

CHAP. XVII.

Of the Damage done by an Injury, and of the Obligation thence arising.

I. WE have already shewn, that a Man may have a *Right* to a Thing three several ways, either by *Contract*, by an *Injury* done him, or by *Law*. Of *Contracts* we have fully treated. Let us now come to that *Right*, which arises by the *Law of Nature* from an *Injury* received. We here call any *Fault* or *Trespass*, whether of *Commission* or *Omission*, that is contrary to a Man's Duty, either in respect of his *common Humanity*, or of his particular *Quality* or *Station*, an *Injury*. (a) From such a *Fault* or *Trespass* there arises an *Obligation* by the *Law of Nature* to make *Reparation* for the *Damage*, if any be done.

I. That an Injury obliges us to repair the Damage.

II. (b) The Word *Damnum*, Damage, probably derived from *demo* to take away, is τὸ ἐλαττον, when

II. Damage is that which is contrary to a Man's Right strictly so called.

C c 3

(a) From such a *Fault* or *Trespass* there arises an *Obligation* by the *Law of Nature*.] Call'd by the Greeks ἀδικησις δίκην. an *Action* of *Neglect*. See in decretal. tit. de injuria & damno dato, and D. ad l. Aquiliam & Vicinas rubricas.

(b) The Word *Damnum* Damage, probably derived from *demo*] So Varro, l. 5. *Damnum* from *demitto* an *Abatement*, when there's less made of a Thing than it stood one in. Others rather approve of its Derivation from the Greek δαπάνη an *Expence*, and will have it to be first *Dapnum*, afterwards *Damnum*, as ὕπνῳ & *Sopnus*, *Somnus*. Nor is it any Absurdity to deduce it from the Greek δάμνω, which signifies βιάζω to offer Violence, or from ζῆνεια *damia*, *damnum*, as *regia*, *regnum*.

when a Man has *less* than his Right; whether that Right be merely from *Nature*, or some *super-added* Human Act, such as *Property*, *Contract* or *Law*. A Man's *Life* is his own by *Nature* (not indeed to destroy, but to preserve it) and so is his *Body*, his *Limbs*, his *Reputation*, his *Honour*, and those Actions that peculiarly belong to him as a Man. How any one's Possessions become his own by *Property* and *Contract*, we have shewn in a former Treatise, both as they regard the *Things* themselves, and the *Right* over the *Actions* of others. In like manner any one's Possessions become his own by *Law*; because the Law has an equal or greater Power over the *Persons* and *Estates* of those who are subject to it, than any private Man has over *himself*, and what belongs to him. So an *Orphan* has a Right to require his *Guardian* to take strict Care of him; the same may the *State* require of a *Magistrate*, and not the *State* only, but any *private* Member of it, as often as the Law intimates so much either *expressly*, or by plain Consequence.

III. A *Fitness* for a Thing is carefully to be distinguished from a Right strictly so call'd.

III. 1. But from a mere *Aptitude* or *Fitness*, which is less properly called a *Right*, and rather belongs to *Distributive Justice*, arises no true *Property*, and consequently no *Obligation* to make *Restitution*; because a Man cannot call that his own, which he is only *capable* of, or *fit* for. For, as *Aristotle* observes, *He does not transgress the Rules of Justice, who out of Tenaciousness refuses to relieve a poor Man with his Riches*. And this, says *Cicero*, in his Oration for *Cn. Plancius*, is the *Privilege of Free Citizens*, that by their *Vote* they can give or take from any Man what they please. And yet he presently after subjoins, that it hereby happens, that *Citizens* do what they will, not what they ought, the Word *ought* being taken in a larger Sense.

2. But

2. But here we must take care that we do not confound things of a different kind. For he, to whom the Power of making *Magistrates* is committed, is bound to the *Commonwealth* to make choice of such a Person as is *fit* for the Office; and the *Commonwealth* has properly a *Right* to require this of him. Wherefore if the *Commonwealth* shall by his bad Choice suffer any *Damage*, he is obliged to make it good. So likewise any *Citizen* that is not *unqualified*, although he have no proper Right to a *Place* or *Office*, yet the Right of being a *Candidate* truly belongs to him. And if he be hindred, either by Force or Fraud, from exercising this Right, he may require *Satisfaction*, not according to the full Value of the Place, but the *uncertain Damage* he sustained thereby. He has the same Right to sue for Satisfaction to whom a *Testatour* would have left a *Legacy*, but by Force or Fraud was hindred. For to be *qualified* to receive a *Legacy*, is a kind of Right, and consequently, to deprive the *Testatour* of his Liberty of bequeathing it, is an *Injury*.

IV. A Man is understood to have *less* than his due, and consequently to suffer *Damage*, not only in the thing it self, but in its genuine *Fruits*, whether they be gathered or not, if he should otherwise have gathered them (deducting the necessary Expences of cultivating and gathering them) from the Rule that forbids us to enrich our selves by another Man's Loss.

V. But the *Hopes* of the *Gain* or *Increase* are not to be computed as high as if it was already made, but according to the nearness of our *Hopes* of obtaining it, as the *Hopes* of *Harvest* in the *Sower*.

VI. Besides the Person that doth the *Injury* himself, there are others also who may bring themselves under the same Obligation, either by *doing*

IV. That *Damage* is to be extended even to the *Fruits* or *Increase* of any thing.

V. And also to the ceasing of that *Increase*.

VI. *Damage* occasioned by doing what we ought not; *Primarily*.

what they ought not, or not doing what they ought to have done. By doing what they ought not to have done, *Primarily* or *Secondarily*. *Primarily*, as he who *Commands* it to be done, he who being asked *gives his Consent*, he who *assists* in the Action, he who *receives* what is unjustly taken away, or becomes in any other manner a *Party* in doing the *Injury*.

VII. And
Secondarily.

VII. *Secondarily*, He that *advises* the doing it, or (c) *commends* and *approves* of it when done. For what difference is there, saith Cicero, Philip 2. (d) *between the Man that perswades us to do a thing, and him that approves of it, when done?*

VIII. Also
by not do-
ing what
we ought;
Primarily:

VIII. By *not doing what he ought*, a Man is likewise bound to make *Reparation*, *primarily* or *secondarily*. *Primarily*, when by his *Station* or *Office* he ought, to *forbid* the doing it, by giving his *Commands* to the contrary, (e) or to *succour* him that has the *Wrong* done him, and does it not; such an one is called by the *Chaldee Paraphrast* טור a *Strengthner of Wickedness*.

Secon-

(c) *Commends*] Totilas in his Oration to the Goths in Procop. Gothic. 3. ὁ δὲ ἐπαινεῖσας &c. For he who praises the Person who does it, is himself to be accounted the Author of the Fact. And Ulpian, l. 1. c. de servo corrupto. Tho' he would certainly have run away, or stolen something of himself; yet if upon discovering his Intentions to another, that other shall commend his Design, he is bound to make Satisfaction; for we ought not by our Commendations to encourage another to do Mischief.

(d) *Between the Man that perswades us to do a Thing, and him that approves of it when done*] Ammianus in his 27th B. applies this Saying to Probus the Prefect. And by the Lombard Law, l. 4. tit. 4. even the Adviser is a Party concerned in making up the matter. See Rom. 1. at the end, and some old Authors there.

(e) *Or to succour him that has the Wrong done him, and does it not*] Nicetas Choniates in his Michael Comnenus. ὁ ἐμπρησμός &c. He is not only to be accounted an Incendiary, who sets Fire to his Neighbour's House, but he also, who could have extinguished it, and would not.

IX *Secondarily*, He that doth not *dissuade*, when he ought; or *conceals* the Fact, when he ought to have discovered it. In all which cases the word *ought*, has only Respect to that *Right* which is properly so called, and is a part of *Commutative Justice*, whether it arise from the *Law*, or from any *Quality* in the Person. For if it be due only by the Rules of *Charity*, the *Omission* of it is indeed a *Sin*, but not such an one as obliges him to make *Reparation*; which as aforesaid arises only from *Right* properly so called.

IX *And Secondarily.*

X. It is likewise to be observed, that all these Men we have mentioned, lay themselves under this Obligation, only if they were the true *Cause* of the *Damage* done, that is, if they really *contributed* either to the *whole* or to any *part* of it. For if he that did the Injury would certainly have done it *without* their *Act* or *Neglect* (as it often happens in those of the *second Order*, and sometimes in those of the *first*) they are not bound to make *Reparation*. Which yet is not to be understood, as that, if others be not *wanting* to persuade or assist, those others do not bring themselves under the same Obligation, in case he would not have done the *Injury* without their Assistance or Counsel. For those too, if they had actually *abetted* or *assisted*, would have been bound to make *Reparation*.

X. *What those must contribute towards the Act who are bound to repair the Damage.*

XI. But those are principally bound, who by their *Command*, or by any other Means, have compelled another to do an Injury: If there were none such, then he who *committed* the Fact; and after him the rest, every one that *contributed* towards the Fact, is bound to make *Reparation* for the whole Damage, (f) if the whole Fact proceeded from him, tho' not from him alone.

XI. *In what Order they are bound.*

XII. He

(f) *If the whole Fact proceeded from him, tho' not from him alone.*
Lex. Longobard, l. 1. tit. 9. 5.

XII. This
Obligation
to be ex-
tended even
to the Con-
sequent Da-
mage.

XII. He that is bound to make Reparation for the *Fact*, (g) lies under the same Obligation in regard to its Consequences. (h) In one of *Seneca's* Controversies this Question is handled in an Instance of a *Plane-Tree* set on Fire, whereby an House was burnt; where he gives us this as his Opinion upon it, *Although you were unwilling to have done part of the Injury, yet are you bound to make Reparation for the whole, as much as if you had intended it. For he ought to have been unwilling as to the whole, that would excuse himself through Ignorance or Unwittingness. Ariarathes* King of *Cappadocia*, damming up through Wantonness the Passage of the River *Melanes*, forced its Waters out of their Channel, whereby they so swelled the River *Euphrates*, that it swept away part of the *Cappadocian* Lands, and did great Damage to the *Galatians* and *Phrygians*; whereupon, the Case being referred to the *Romans*, he was adjudged to pay 300 Talents Damage.

XIII. An
Instance in
a Man-
slayer.

XIII. Take these Instances that follow as Examples. He that kills a Man unjustly, is bound to pay Physicians and Surgeons, if any be made use of, and to make such Reparation to those, whom the deceased Person was obliged in Duty to maintain, such as Parents, Wife, Children, as the hope of that Maintenance (regard being had to the Age of the Deceased) amounted to. For as *Michael* the *Ephesian* well observes, upon *Aristot. Nicom. 5. ἀλλὰ καὶ ὁ φονεὺς* &c. The Person that is killed has some Recompence made him, since what is paid to his Wife, his Children, or his Relations, is in some mea-

(g) Lies under the same Obligation in regard to its Consequences.] See *Aquinas* prim. secund. quest. 20. art. 5. and l. si servus servum, § si quis insulam. D. ad l. Aquiliam.

(h) In one of *Seneca's* Controversies.] Excerpt. v. 5.

measure paid to himself. We speak here of an *unjust* Manslayer, who had no Right to commit that Violence which was the Cause of Death. Wherefore when a Man may lawfully kill another, tho' he be thereby guilty of a breach of *Charity*, as he, who being assaulted by his Enemy would not fly from him, but killed him in his own Defence, yet is he not bound to make Reparation. Because the Life of a *Freeman* cannot be valued, but that of a *Slave* may.

XIV. (i) He that *maims* another, is obliged in like manner to *pay* for his *Cure*, and to make him Satisfaction for the Loss of his *Limb*, because he is hereby rendred incapable of getting so much by his Labour, as he might otherwise have done. But as I said before of the *Life*, so here I say of the *Limbs* of a *Free-man*, that they cannot be valued. The same may be said of *false Imprisonment*.

XIV. In one who maims another.

XV. So an *Adulterer* and *Adulteress* are not only bound to free the Husband from the *Expence* of keeping the *Child*, but to make the *legitimate* Children Reparation for whatsoever Damage they shall sustain, by any *Share* or *Portion* that Child shall claim in the Inheritance. He that either by *Force* or *Fraud* deflowers a Virgin, is bound to pay her so much, at she is damnified in her hopes of Marriage: Nay moreover, if he obtained his Desires by promising her *Marriage*, he is bound to perform that Promise.

XV. In an Adulterer and Fornicator.

XVI. A *Thief* or *Robber* is bound to restore what he has taken away, together with its natural Increase, and to make Reparation, if either the Thing

XVI. In a Thief, a Robber, and others.

(i) He that maims another is oblig'd in like manner to pay for his Cure, &c.] The same was observed among the Hebrews, *Baba Kama*. c. 8. §. 1. and among the English and Danes; see a Treaty of theirs in the Learned Pontanus's Discourse of the Sea.

thing be *damaged*, or *lessened* in its Value; and if it be intirely lost or destroyed, then is he to return the Value of it, not according to the *highest*, nor the *lowest*, but a *moderate* Computation. Among these we may also rank such as defraud their *Prince* of his lawful *Taxes* or *Customs*. In like manner are those Men bound to make Reparation, who either by an *unjust* Sentence, by *false* Accusation, or false Testimony have done their Neighbour an *Injury*.

XVII.
In one who
procures a
Promise by
Fraud or
unjust Fear.

XVII. As also he that procures a *Contract* or *Promise* by Force, Fraud, or unjust Terror, is bound to make full Restitution to him, that the Promise was thus extorted from; for such a Practice is a Breach of a double Right, that belongs to every one, not to be *imposed* upon or deceived, and not to be *compelled*; the one springing from the *Nature* of *Contracts*, the other from his natural *Liberty* or *Freedom* of Action. And in this Class we may insert those, who will not do what by their Office they are obliged to do, without a *Bribe*.

XVIII.
What, if by
Fear that is
accounted
just by the
Law of Na-
ture?

XVIII. But he that hath given just Cause, why he *ought* to be compelled by Force or Terror, must blame himself; for an *involuntary* Act arising from a *voluntary* one, is accounted by the Morallists a voluntary one.

XIX
What, if by
Fear ac-
counted just
by the Law
of Nations?

XIX. But as it is established by the Consent of Nations, that all *Wars*, declared and carried on by the Authority of the *Supreme* Powers, shall on both sides be accounted *Lawful*, as to the outward Effects or Consequences of them, (whereof we shall treat hereafter) so likewise is the *Fear* of such a War so far to be accounted just, that if any Advantage be obtained it cannot be required by the adverse Party. And in this Sense may be admitted the Distinction made by *Cicero* between an *Enemy*, with whom, says he, we have many Rights

Rights in *common* by the *consent* of *Nations*, and *Pirates*, and *Robbers*. For if these extort any thing from us by *Fear*, we may require it, unless we bind our selves by an *Oath* not to require it; but of an *Enemy* we cannot. Wherefore what *Polybius* saith of the *Carthaginians*, that they had just Cause to enter into the second *Punic War*, because the *Romans* had declared War against them, and taken from them the Island *Sardinia*, and a great Sum of *Mony*, while they were engaged in quelling a Sedition of some People they had taken into their Service, has indeed some *shew* of Equity according to the *Law of Nature*, but is contrary to the *Law of Nations*, as shall be shewn elsewhere.

XX. 1. *Kings* and *Magistrates* are bound to make Reparation, if they do not use such Means, as they may and ought, to prevent *Robberies* and *Pyracy*. For neglect of which the *Scyrians* were formerly condemned by the *Amphictyones*. I remember I was asked the Question concerning a Case that happened, when our *States* had granted Letters of *Mart* to many of their Subjects to take Prizes from the *Enemy*, some of whom had robbed our own Ships, and deserting their Native Country, roved about upon the Seas, and would not return, tho' recalled, whether the *States* were bound to make Reparation, either for employing such *lawless* Men, or not taking a Caution or Security of them, that they should not exceed their Commission: To which I answered, that the *States* were no further obliged, than to *punish* or *deliver up* the *Delinquents*, if they could be taken, and so make over to the Persons injured a Right to the Goods of these *Robbers*. In as much as the *States* were neither the Cause of this *Depredation*, nor *Partakers* of it, but had prohibited this Practice by *Law*. That

XX. How far the Civil Powers are bound for Damages done by their Subjects; where the Question is handled concerning Prizes taken at Sea from Allies contrary to Public Command.

That they were not in any wise obliged to require a *Caution*, since they may, even without Letters of *Mart*, give all their Subjects free Liberty to take as many Prizes as they can from their *Enemy*, as was formerly done: Nor can such a *Licence* be accounted the Cause of this Injury done to our Friends, since *private* Men may *without* any such Licence equip a Fleet, and put out to Sea. Nor could it be foreseen that these Men would prove *wicked*; nor can we altogether avoid the employing of wicked Men; for then it would be impossible to raise an Army.

2. Nor are *Kings* bound to make Reparation, if their *Soldiers* either by Sea or Land shall do their *Subjects* or *Allies* any Damage, contrary to their Command; which is proved by the Testimonies (*k*) of *France* and *England*. But if any one be bound to make Reparation for what his *Minister* or *Servant* does without his Fault, this Cause is not to be determined by the *Law of Nations*, but by the *Civil Law*; nor by that in general, but by certain *By-Laws* made against *Mariners*, and some others, for particular Reasons. And thus hath this Case been determined by the Judges of the Supreme Assembly against certain *Pomeranians*, and that according to Precedents of adjudged Cases of the like Nature two Ages before.

XXI. That by the Law of Nature no Man is bound to repair Damages done by his Beast or Vessel without his Knowledge.

XXI. It is likewise to be observed, that it is by the *Civil Law* we are bound to deliver up our *Slave* or our *Beast* to be punished, that hath done our Neighbour any Damage. For the Master that is not in Fault, is not bound to make

(*k*) Of France.] See too *Constitut*, Tom. 3. tit. 2. in the Constitution of the Year 1543, c. 44.

make Reparation by the *Law of Nature*; no more than he, whose Ship, without his fault, falls foul upon his Neighbour's Ship and damages it. Although by the *Laws of many Nations*, as by our own, such Damages are to be equally divided between them both, by Reason of the Difficulty of proving the Injury.

XXII. But, as aforesaid, we may suffer Damage, even in our Honour and Reputation, as by *Stripes, Reproaches, Curses, Calumnies, Scoffs, and* such like. And in these, no less than in *Thefts* and other *Crimes*, the Height of the Offence is to be judged by its Effects. For as the *Thief* is to be punished, so is the *Slanderer* to make *Reparation* for the Damage he has done, by *confessing* his Fault, by (1) *declaring the Innocence* of the injured Person, by *begging his Pardon*, and the like; tho' if the *injured* Person desire it, Reparation may be made for such an Offence by *Money*, that being the common *Standard*, whereby every thing that is profitable may be valued.

XXII. That we may do a Man Damage in his Reputation and Honour, and how this is to be repair'd.

(1) *Declaring the Innocence of the injured Person.* See the Example of *Vivian in Cassiod. 4. 41.* who was touched with Remorse for, and repented of an unjust Accusation.

CHAP.

C H A P. XVIII.

Of the Rights of Ambassage.

I. That certain Obligations arise from the Law of Nature, such as the Rights of Ambassage.

WE have hitherto treated of those Rights, that belong to us by the *Law of Nature*, adding some few that arise from the voluntary *Law of Nations*, as it is an *Addition* to the *Law of Nature*. Let us now come to consider, what Obligations that *Law of Nations*, which we call *Voluntary*, doth of it self lay us under. Whereof the chief Head is, of the *Rights of Ambassage*. For in all Authors mention is made of the *Sacred Rights of Ambassage*, of (a) the *Sanctity of Ambassadors*, of the *Right of Nations due to them*, of a double

(a) The *Sanctity of Ambassadors*.] Pomponius l. siquis. D. de legationibus: If any one shall strike an Ambassador, though sent from an Enemy, he is thought to violate thereby the *Law of Nations*, because Ambassadors are accounted Sacred. And for this Reason, if, whilst Ambassadors of any Nation are Resident with us, War be declared against their Principals, they still remain at Liberty. For this is agreeable to the *Law of Nations*. And therefore Quintus Mucius us'd to say, that he who stroke an Ambassador ought to be deliver'd up to the Enemy that employ'd him. By the *Julian Law*, which particular affects Ambassadors, Envoys, and their Retinue, 'tis a Riot if any Body be prov'd to have struck or injured any of them; as Ulpian replies in l. lego Julia D. ad legem Juliam de vi publica. Josephus Antiq. Hist. l. xv mightily crys up the Sacred Privileges of Ambassadors, who, he says, are honour'd with the same Name as the Angels and Messengers of God. Varro l. iii. de lingua latina: the Persons of Ambassadors are Holy. Cicero, Verr. iii. The Rights of Ambassadors are secured both by a Divine and Human Guard, and the very Name ought to be so Sacred and Venerable, as to be safe and inviolable, not only amongst Allies, but amidst the Arms of contending Foes. The Author of Epaminondas's Life: When he thought him secured by the Rights of Ambassage, which every Nation us'd to regard with the Profoundest Reverence. Diodorus Siculus (in excerpt Perier. n. 148.) calls this ἀδεια ἢ ἡ ἀρεσβευτῶν ἀσυλία, a Privilege

ble Right both Divine and Human; the Right of Ambassage is accounted by all Nations Sacred, it is called the Holy League of Nations, and the Human League; and the Persons of Ambassadors are styl'd Sacred.

A Name, that Nations always Sacred held. Papin.

And Cicero in his Book of the Answers of Sooth-sayers: *I am of Opinion, saith he, That the Rights of Ambassadors are guarded by all Laws both Divine and Human. Wherefore to violate this Right is* *not*

lege of Security, that the Sacredness of Ambassadors entitles 'em to. In Papinian l. ii.

*An Ambassador,
Whene'er he will, returns in Safety.*

And again:

*Ambassador's a Name
By ev'ry Age in Veneration had.*

St. Chrysostom, *ὅτι ἡ δὲ κοινὴ &c.* without any manner of Regard to the Common Law of Mankind, that never suffers an Ambassador to be molested. Servius upon Æneid x. *By the Right of Nations screen'd from every Injury.* Not to set down all the Passages to this Purpose, see Livy of the Laureates; Dion Chrysostom de lege & consuetudine; Velleius Paterculus, inst. l. ii. Menander Protector; Felix's Epistle to Zeno in append. Cod. Theod. by Sirmondus. Totilas in Procopius, Gotth. iii. *πᾶσι μὲν &c.* To speak in general, 'tis an establish'd Custom even with all the Barbarians in the World to Reverence the Character of Ambassadors: The same has Scaffnaburgensis related of the barbarous and unciviliz'd People. Aimonius attributes these Expressions to King Clodovans: *And lastly by the united Force of Divine and Human Laws, which ordain that those, who are commission'd the Mediators and Composers of Hostilities, shall themselves be Free from Hurt and Molestation For in War and Arms 'tis an Embassy alone that can solicit Peace; and the Person employ'd in that Friendly Service is no longer an Enemy.* See also Radevicus in append. See Cromerus of the Polanders. l. xx. Leunclavius of the Turks, l. viii. Mariana of the Moors, l. xii.

II. Among
whom this
takes place.

not only unjust, (b) but impious, as it is acknowledged by all, says Philip in his Epistle to the Athenians.

II. 1. But first of all we must take Notice, that this Right of Nations, of how great Extent soever it be (which we shall see by and by) doth only belong to those Ambassadors, who are sent by Sovereign Powers to each other. For such as are sent by Provinces, Cities, or any other subordinate Powers, are not governed by the Law of Nations, which is between different Nations, but by the Civil Law. An Ambassador in Livy calls himself the publick Messenger of the People of Rome. And in another Place of the same History, the Roman Senate declares, that the Right of Ambassage is not granted to a Citizen, but to a Foreigner; and Cicero, to shew that they ought not to send Ambassadors to Anthony, says, *We have not to do with Hannibal a publick Enemy, but with a Citizen.* Now what is meant by a Foreigner, no Lawyer could have shewn us more plainly, than Virgil has done:

*For every Land not subject to our Yoke,
I foreign call.*

2. Those therefore, that are (c) joyned in Alliance, though it be upon very unequal Terms, since they do not cease to be a Free, People shall have the Right of sending Ambassadors: Nay, even those, who are partly subject and partly free, for that

(b) But Impious.] ἔργον ἀσεβές. a wicked Irreligious Thing, says Plutarch in his Life of Æmilius, relating what Gentius had done. Josephus Antiq. Hist. l. xv. ἵστο το ὄνομα &c. This awful Name is able to reconcile one Enemy to another. And therefore what can be a greater Act of Impiety than to murder Ambassadors, who are interceding only for what is Just and Reasonable?

(c) Joined in Alliance, though it be upon very unequal Terms.] Cromerus xxx.

that Part where they are free. But *Kings*, that are conquered in a declared, open War, lose, together with their other Privileges, that of *Ambassage*. Therefore *P. Æmilius* kept the Heralds of *Perseus*, whom he had subdued, Prisoners.

3. But in *Civil Wars*, *Necessity* does sometimes make way for this *Right*, though irregularly. (d) As suppose a Nation be divided into Parties so equal, that it is hard to judge, whether Side can be called the *Government*; or when *two* Persons with very equal Titles contend for the *Succession* to the *Crown*. For in such Cases *one* Nation may for the Time be accounted *two*. Thus are the (e) *Flaviani* accused by *Tacitus*, that in their Civil Sedition they had violated the Rights of Ambassadors in the Persons of the *Vitellians*, Rights Sacred even amongst foreign Nations. *Pirates* and *Robbers*, that do not constitute a settled Government, have no *Right of Nations* belonging to them. *Tiberius*, when *Tacfarinas* sent Ambassadors to him, was highly provoked, that a *Deferter* and a *Rogue* should presume to treat with him, after the manner of an *Enemy*, as *Tacitus* relates. Yet even such Men have sometimes the Privilege of sending *Ambassadors* granted them upon a Promise of their Faith and Honour; as had formerly the *Outlaws* and *Highwaymen* in the *Pyrenean Mountains*.

Dd 2

III. 1. But

(d) As suppose a Nation be divided into Parties so equal] See *Johan. Mariana*, l. xii. 8. about the Ambassadors of the City of *Toledo* to the King; and *Crantzius* about the People of *Flanders*. *Saxon*, xii, 33.

(e) The *Flaviani* accus'd by *Tacitus*.] And *Magnentius* in *Zosimus*, l. ii. Μαγνέντιος &c. *Magnentius* was a pretty while considering with himself, whether he should dismiss *Philip* without giving him an Answer, or detain him contrary to the Privilege of Ambassadors. This *Philip* was come from *Constantius*.

III. Whether an Embassy be always to be admitted.

III. i. But there is a twofold Right, we find, attributed to Ambassadors, viz. first (f) to be admitted, and then to have no Violence offered them. Concerning the first there is a Passage in Livy, where Hanno the Carthaginian Senator thus inveighs against Hannibal. Our good General refused to admit into his Camp Ambassadors that came from his Friends, and on their Behalf: he has broke the Law of Nations. Which yet is not to be taken in so large a Sense as if none were to be denied Admittance. For (g) the Law of Nations does not require that all Ambassadors should be admitted, but that none should be rejected without Cause. Now there are three Causes why Admittance may be denied, either the Potentate sending, the Person sent, or the Subject of the Embassy.

2. Melesippus the Spartan Ambassador was commanded by Pericles to depart out of the Athenian Territories, because he came from an armed Enemy. So (h) the Roman Senate denied the Carthaginian Ambassadors Admittance while their Army was in Italy. And so did the Achaians to those of Perses, while he was making Warlike Preparations against the Romans. The like did Justinian to the Ambassadors of Totilas; and the Goths in Urbin to those of Belisarius. An Instance of the second Cause we have in Theodore, surnamed the

(f) To be admitted.] Donatus on the Prologue to Hecyra: To be admitted to Audience is a Right the Law of Nations has given Ambassadors.

(g) The Law of Nations does not require that all Ambassadors should be admitted.] See Camden in the Year MDLXXI. The fourth Question propos'd there.

(h) The Roman Senate deny'd the Carthaginian Ambassadors Admittance, while their Army was in Italy.] See Sereius upon the viith Æneid concerning this Custom of the Romans.

the *Atheist*, to whom *Lyfmachus* denyed Audience, when he came upon an Embassy from *Ptolemy*. And others have met with the like Treatment, only through *Personal Hatred*. The third Cause we mention'd takes Place, (i) when either the *Design* of the Treaty is suspected, as was deservedly that of *Rhabshakeb* the *Affyrian* to *Hezekiah*, to stir up the People to Sedition; or when it is not suitable to the *Dignity* of the *Potentate*, to whom it is sent; or when it is *unseasonable* as to the Time. So the *Romans* forbid the *Aetolians* to send any Embassy without their *General's* Permission; nor was *Perseus* permitted to send any Ambassadors to *Rome*, but only to *Licinius*: and in like manner when *Jugurtha* sent his Ambassadors to *Rome*, they put forth an Edict, (k) that they should depart out of *Italy* within ten Days, unless they were come to deliver up their *King* and *Kingdom*. And thus may those Ambassadors in *Ordinary*, that are continually resident at most Courts, deservedly be rejected as unnecessary, and a new *upstart* Custom not known to former Ages.

IV. Concerning the latter Right of Ambassadors, viz. (l) that no Violence is to be offered them, the Question is more difficult, and variously handled by the great Men of the Age. Let

IV. That Defence is Lawful against Ambassadors by way of preventing Mischief, but not by way of Punishing.

D d 3

us

(i) When either the Design of the Treaty is suspected.] So *Andrew Burgus* *Caesar's* Ambassador, was deny'd Admittance into *Spain*; *Marianā*, l. xxix. There's another Instance of this in *Cramerus*, l. xx.

(k) That they should depart out of Italy within ten Days.] The Emperor *Charles* the Vth commanded the Ambassadors of *France*, *Venice* and *Florence*, sent to declare War against him, to be conducted to a Place 30 Miles distant from his Court, *Guicciardin*, l. xviii. *Bellajus*, l. iii.

(l) That no Violence is to be offered them.] *Menander* Protector speaking of the Emperor *Justin* the second; οὐδὲν ἔμελλεν ἐπὶ τοῦ βασιλέως ἀντιπαραστήσειν, But he contrary to the common Rights of Ambassadors put 'em in Chains. See *Ern. Cothm*, esp. xxxii. n. 29 &c. Vol. v.

us speak first of the *Persons* of Ambassadors, and then of their *Retinue* and *Goods*. As to their *Persons*, some think that they are only protected from unjust Violence by the *Law of Nations*, imagining that their Privileges are no greater than those, that belong to every one in Common. Others, that Violence ought not to be offered to an Ambassador for every Cause, but only when he violates the *Law of Nations*, which is extensive enough; for in the *Law of Nations*, that of *Nature* is included; so that at this rate an Ambassador may not be punished for any Crime, but such as are committed against the *Civil Law* only. There are others of Opinion, that Violence is never to be offered to an Ambassador, unless he be found to act against the *Government* or the *Dignity* of the *Potentate*, to whom he is sent; though some think even this to be of dangerous Consequence, that Complaint should rather be made to his *Principal*, and that it should be left to him, to punish his Ambassador according to his Pleasure. Others would have us appeal to *Kings* and *Nations*, that are entirely disinterested, and to be determined by their Arbitration; which indeed may be done in Point of *Prudence*, but cannot be claimed as a *Right*.

2. Nothing of Certainty can be concluded from the Reasons each of these give to confirm their Opinions; for this *Right* is not grounded upon sure and infallible Principles, as a *Right of Nature*, but takes its Measures from the *Will* and *Pleasure* of the *People*. And they were at Liberty to have provided for the absolute Security and Protection of Ambassadors in all Cases, or only with such and such Reserves and Exceptions: By this last Method publick Good had been consulted, which consists in the Punishment of Great and Capital Offenders; by the former the Interest and Advantage of Embassies, which are the more encouraged and facilitated the more

Security and Protection they are entitl'd to. We are therefore to consider how different Nations have agreed in this Point; which cannot be proved by Instances only. For Instances enough may be alledged on both sides. We must therefore have Recourse both to the Opinions of *wise Men*, and the Probability of *Reason*.

3. We have two most famous Opinions; the one of *Livy*, the other of *Salust*. That of *Livy* is upon the Ambassadors of *Tarquin*, who had corrupted the Citizens to betray *Rome* to them. *Although*, saith he, *they seemed to have done such Things, as deservedly to denominate them Enemies, yet the Law of Nations prevailed in their Favour*. Here we likewise see the *Law of Nations* extended even to those that commit Acts of *Hostility*. The Saying of *Salust* may more properly be attributed to the *Attendants* of Ambassadors (of whom below) than to *themselves*. But the Argument holds good *a majori ad minus*, i. e. from a Thing less credible to one more so. *Bomilcar*, saith he, *an Assistant in the Embassy sent to Rome, was rather guilty of a Breach of Goodness and Equity, than of the Law of Nations*. Where *Goodness and Equity* is to be understood of the *Law of Nature*, which suffers every Offender to be *punished*, that can be convicted, but the *Law of Nations* makes Exceptions in behalf of *Ambassadors* and Persons of *publick* Characters. And therefore to proceed against *Ambassadors* as *Criminals* is to act against the *Law of Nations*, which prohibits several Things that the *Law of Nature* allows.

4. The *Probability of Reason* is likewise on this side of the Question. For it is most probable that the *Privileges* of *Ambassadors* should include in them some greater Right, than what is due to all People in *Common*. But if an Ambassador were only to be protected from unjust Violence, this would be nothing extraordinary or peculiar. Besides the

Protection of an *Ambassador* from Punishment outweighs the Benefit, that could accrue to the *Publick* by his Punishment. For he may be remitted to his *Principal* to be punished; and if he refuse to do it, then *War* may be levied against him, as an *Approver* of the Crime. Some object, that it is better that *One* should be punished, than a *Multitude* involved in *War*. But if the *Potentate* approve of the Fact of his *Ambassador*, his Punishment would not have kept off the *War*. Besides, the Safety of *Ambassadors* is but very slenderly provided for, if they be obliged to give an Account of their Actions to any but their *Principals*. For since the *Reasons* of *State* in those that send, and those that receive the *Ambassador*, are commonly different, nay, often quite contrary, it could scarce ever happen, that something might not be laid to the *Ambassador's* Charge, that would carry the Colour of a Crime. And though some Crimes be so manifest as to admit of no doubt, yet the Danger, there generally is, in punishing *Ambassadors*, is sufficient Reason for an *Universal* Law against punishing them at all.

5. Wherefore I am of Opinion, that though it has prevailed as a common Custom every where, that all People that reside in Foreign Countries, should be subject to the *Laws* of those Countries; yet that an *Exception* should be made in Favour of *Ambassadors*, who, as they are supposed to be the very Persons whom they represent, (he brought along with him, saith *Cicero* of a certain *Ambassador*, the Majesty of a Senate, and the Authority of a Commonwealth) so may they by the same kind of Fiction be imagined to be out of the Territories of the *Potentate*, to whom they are sent. Hence it is, that they are not subject to the *Laws* of the Country, where they reside. Wherefore if any slight Crime be committed by an *Ambassador*, it

is either to be *conniv'd* at, (m) or he is to be *commanded* to *depart* out of the Kingdom, as was done to him, saith Polybius, who procured the Escape of the Hostages from Rome. Hence we may take Notice by the way, that an *Ambassador* of the *Tarentines*, who had been guilty of the same Crime, was *scourg'd* for it; but this was done at a Time (n) when the *Tarentines* being conquered by the *Romans* were become their *Subjects*. But in case the Crime be *great*, and tending to endanger the *Publick* Safety, (o) the *Ambassador* is to be *remitted* to his *Principal*, with a *Demand*, either that he *punish* him himself, or *deliver* him up to be *punished*; as we read of the *Gauls*, That they demanded the *Fabii* to be delivered up to them.

6 But what I have observed already of all *Human* Laws, *viz.* That they are so made as not to oblige in Cases of *extreme* Necessity, will also hold good even in these Laws concerning the *Sanctity* of *Ambassadors*. But these Cases of *extreme* Necessity do not consist in exacting *Punishment*, which in several other Cases may be taken away by the *Law of Nations*, as will appear afterwards, when we come to treat of the Effects of an *open* declared War; much less in the *Place*, *Time* or *Manner*

(m) Or he is to be commanded to depart out of the Kingdom.] Stephen King of Poland did so to the *Muscovites*. *Thuanus*, l. lxxiii. Anno MDLXXI. And *Elizabeth* to the *Scott* and *Spaniard*. You have both these Instances in *Cambden* at the Year MDLXXI and LXXXIV.

(n) When the *Tarentines* being conquered by the *Romans* were become their *Subjects*.] So *Charles the Fifth* commanded the *Ambassador* of the *Duke of Milan*, as his *Subject*, not to stir from his Court. *Guicciardin*, l. xviii.

(o) The *Ambassador* is to be remitted to his *Principal*.] Dion in except. *legat.* ὅτι νεανίσκοι τινες &c. When certain Young Gentlemen of the *Carthaginians* were come *Ambassadors* to *Rome*, and there acted some *Unbecoming Things*; they were remitted to *Carthage* and delivered up to their *Principals*, but received no manner of *Injury* from the *Romans*; they were only *dismis'd*.

Manner of inflicting the Punishment, but in preventing some horrid Design, especially against the Publick. Wherefore, to prevent any imminent Danger, an Ambassador may be both imprisoned and examined. (p) As were Tarquin's Ambassadors by the Roman Consuls, special Care being taken that the Letters and Papers then in their Custody should not be put out of the way or lost.

7. But if an Ambassador make an Assault with Arms, it is lawful to kill him, not indeed by way of Punishment, but in our own Defence. So the Gauls might have killed the Fabii, whom Livy calls Violators of Human Right. Wherefore Demophon (in Euripides) resisted Eurystheus's Herald by Force, when he attempted by Force to rescue the Suppliants; and when the Herald demanded of him,

Dar'st thou an Herald strike who's hither sent?

He answered,

Yes, if that Herald offers Violence.

The Herald's Name was (r) Copreo, and (s) because he offered Violence, he was slain by the People

(p) As were Tarquin's Ambassadors.] Pelopidas was imprison'd by Alexander Pheraus, because when he was Ambassador he excited the Thessalians to assert their Liberty. Plutarch and the Latin Writer of Pelopidas's Life.

(q) Special Care being taken that the Letters and Papers.] See Servanus in Henry IV.

(r) Copreo.] See Iliad 15.

(s) Because he offered Violence.] And in this Sense must we take what Theodahatus the Goth says to Justinian's Ambassadors in Procopius, Gothic. 1. σεμνὸν μὲν τὸ χρῆμα &c. All the World look upon the Character of Ambassadors to be in every respect Sacred and Honourable, which Honour they may justly claim as long as by their good

People of *Athens*, as *Philostratus* records in the Life of *Herod*. The same way does *Cicero* resolve this Question, whether a Son ought to accuse his own Father, who is a Traytor to his Country. If the Danger be imminent, he ought by way of Prevention, but if the Danger be past, he ought not by way of Punishment.

V. 1. But this Law, which we have been speaking of concerning the Protection of Ambassadors from Violence, only obliges him, to whom the Embassy is sent, and upon condition he admits it, as if from that time a sort of tacit Agreement commenced between them. But he may, and oftendoth, forbid Ambassadors to be sent; or treat them as Enemies, if they come without his Permission. So were the *Ætolians* threatned by the *Romans*; and formerly an Edict was published by them against the *Vejentine* Ambassadors, that unless they departed out of their City, they would shew them no more Mercy, than *Tolumnius* their King had shewed to the *Roman* Ambassadors, whom he commanded to be put to Death. So did the *Sammites* threaten the *Romans*, that if they came into the Council of *Samnium*, they should not depart in Safety. This Law therefore doth not oblige those, through whose Territories Ambassadors

V. That he to whom the Ambassador is sent is not bound to observe the Rights of Ambassage.

good Behaviour they maintain the Dignity of their Employment. But Men generally agree, that it is lawful even to kill an Ambassador, if he affronts or is injurious to the Prince he's sent to, or if he attempts another Man's Bed. But here, when the Ambassadors had prov'd that it was scarce possible to suspect 'em of Adultery, since they never stir'd abroad without a Guard, they very prudently subjoin, τὰς λόγους ἢ ὅσους &c. As for what the Ambassador speaks, if it be nothing but what he has receiv'd from his Principal, tho' the Message be not altogether so grateful as it ought, he is no ways culpable, but he who employ'd him must bear the blame; for the Ambassador does in this case only discharge the Commission he was intrusted with. See *Camden* too in the aforesaid passage of the Year, MDLXXI.

bassadors presume to pass without their *Pasport*. For (t) if they be going to their *Enemies*, or coming from their *Enemies*, or attempting in any other manner *Acts of Hostility*, they may lawfully be killed. Thus did the *Athenians* serve the *Ambassadors*, that were going between the *Persians* and *Spartans*; and so did the *Illyrians* those between the *Essians* and the *Romans*; and much more may they be imprisoned; as *Xenophon* ordered some to be committed; *Alexander* those, who were sent from *Thebes* and *Sparta* to *Darius*; the *Romans*, (u) those of *Philip* to *Hannibal*; and the *Latins*, those of the *Volsi*.

2. But suppose *Ambassadors* do meet with *bad Treatment*, without any such Reason, (x) yet that *Law of Nations*, whereof we treat, shall not be esteemed violated thereby, but only the *Friend-*

ship

(t) If they be going to their *Enemies*, or coming from their *Enemies*.] The *Sicilians* in Alliance with the *Athenians* seized upon the *Ambassadors* of *Syracuse* which were sent to some other *States*; *Thucydides*, l. 7. So too the *Argives* seiz'd the *Ambassadors* sent by a few *Factionous People* from *Athens*, and brought 'em to *Argos*. *Id.* *Thucyd.* l. 8. And the *Epirots* intercepted the *Ætolian Ambassadors* going to *Rome*, and made 'em pay very handsomly for it: One of 'em was afterwards, at the Request of the *Romans*, set at Liberty. *Polyb.* excerpt. legat. n. 27. See the Opinions of *Paruta*, l. 11. and of *Bezar*, l. 21. about the *French Ambassadors* to the *Turk*, whom the *Spaniards* took upon the *Po*, and murder'd. And *Crantzius Saxon* 12. about the *Ambassadors* of the *States of Flanders* to the *French King*, whom *Maximilian* apprehended. *Belisarius's* good Nature and Clemency are mightily applauded for sparing *Gelimor's Ambassadors* who had been sent into *Spain*, and were returned to *Carthage* which was then under the *Roman Jurisdiction*. *Procop.* *Vandal* 1.

(u) Those of *Philip* to *Hannibal*.] See *Appian.* Excerpt. legat. n. 19.

(x) Yet that *Law of Nations*, whereof we treat.] 'Tis quite another thing, if any one shall, out of his own Territories, contrive to surprize the *Ambassadors* of another State; for this would be a direct Breach of the *Law of Nations*. And this Affair is contained in the *Thessalians Speech* against *Philip* in *Livy*.

ship and Dignity, either of the Potentate that sent the Ambassador, or of him to whom he goes. Thus writes Justin, of Philip the last King of Macedon. He sent an Ambassador with Letters to make an Alliance with Hannibal, who being apprehended and brought before the Roman Senate, was dismissed in Safety, not out of regard to the Dignity of the King, but for fear they should make him, who before was doubtful, their professed Enemy.

VI. But if the Embassy be admitted, the Law of Nations gives Protection to Ambassadors, (y) even in the time of open War, much more of petty Differences. Heralds enjoy Peace in the midst of War, said Diodorus Siculus. The Spartans, who had killed the Heralds of the Persians, are said to have subverted the Rights of all Men. If any one strike an Enemy's Ambassador, he shall be adjudged guilty of a Breach of the Law of Nations, saith Pomponius, because Ambassadors are held Sacred. Tacitus calls this Right, whereof we now speak, the Right of Enemies, the sacred Right of Ambassage, the Right of Nations. So likewise Cicero, Ought not Ambassadors to be free from Danger, even in the midst of their Enemies? And Seneca, He violated Embassies, having no regard to the Law of Nations. And when the People of Fidenæ put the Roman Ambassadors to Death, Livy calls it a Murder, violating the Law of Nations, a Wickedness, an horrid Fact, an impious Piece of Butchery. And in another Place, when their Ambassadors were brought in Danger, They had not left among them, says he, so much as the Rights of War. So Curtius, He sent Heralds to them with

Pro-

VI. That even an Enemy to whom the Ambassador is sent, is bound.

(y) Even in the time of open War.] See some Passages just now cited at §. 1. And Donatus upon that of the Eunuch. *Convenire & Colloqui, go and have a little Chat.* This is to be understood, as if he had said, Good Mr. Soldier, by your Favour permit me to do what any Enemy, even in the height of War and Hostilities, is allow'd.

Proposals of Peace, whom they slew and threw head-long into the Sea, contrary to the Law of Nations. And with abundance of Reason do these Authors express themselves thus: For even in *War* many *Incidents* happen, which cannot be negotiated but by *Ambassadors*, and *Peace* can scarce ever be made without them.

VII. *Ambassadors not Subject to the Law of Retaliation.*

VII. Another Question is commonly started, *viz.* whether an Ambassador may be put to *Death*, or have Violence in any other manner offered him, by the Law of *Retaliation*, for what his *Principal* had done to any Ambassador sent to him from that Court. And indeed there are many Instances to be met with in Histories of Revenge taken after this manner. And no wonder; for not only just and lawful Actions, but unjust, passionate, outrageous ones are mentioned in Histories. Provision is made by the *Law of Nations*, not only for the Honour of the Potentate who sends the Ambassador, but for the Safety of him who is sent: So that there is a sort of *tacit* Covenant also between the *Ambassador*, and the *Potentate* to whom he goes. He may therefore have an *Injury* done him, when none is done to his Principal. And so that Action of *Scipio's* did not only argue a *greatness* of Soul, but was likewise conformable to the *Law of Nations*, who when the *Carthaginian* Ambassadors were brought before him, and he was asked what should be done to them (soon after the *Roman* Ambassadors had been very hardly used at *Carthage*) he answered, (2) *Nothing like what the Carthaginians*

(2) *Nothing like what the Carthaginians did*] Diodorus Siculus in Excerpt. Peires, Σκιπίων, ἐκ, ἐπὶ, δὲν πρῶτον ὁ τοῖς καρχηδονίοις ἐγκαλεσθῆναι, Scipio said they ought not to do that themselves which they condemned the Carthaginians for: And accordingly the Romans, when they found what the Carthaginians had done, let 'em go. See Appianus. And Constantius dismiss'd Titian sent to him

thaginians *did*. Or according to *Livy*, he said, *He would do nothing unworthy of the Roman Institutions*. In a like case, but a much more ancient one, these words, says *Valerius Maximus*, were spoken by the Roman Consuls, *The Faith of our City, O Hanno, frees thee from that Fear*. For at that time *Cornelius Asina*, contrary to the Right of Ambassage, was put in Chains by the Carthaginians.

VIII. 1. The *Attendants* likewise and *Equipage* of Ambassadors are in some measure to be accounted *Sacred*. Hence in the old Form of Instructions to *Heralds* were these words, *Dost thou admit me, O King, as the Royal Messenger of the People of Rome, together with my Attendants and Equipage?* And by the *Julian Law*, not only those who did the Ambassador himself, but even those that did his *Attendants* any Injury, were declared Guilty of a publick Violence. But (a) these *Privileges* only belong to them by the *By*, as they are *Attendants*; and consequently no longer, than the Ambassador pleases. Therefore if his *Attendants* commit any great Crime, he may be required to deliver them up to Justice. (b) For they are not to be taken from him by Force; which being once done by the *Achaians* to some *Spartans* who were in the Roman Ambassador's *Retinue*, the Romans cried out, *They have broke the Law of Nations*. Whereunto we may also refer the Opinion of *Salust* concerning *Bomil-*

VIII. That the Rights of Ambassage are to be extended even to the Attendants of Ambassadors, if the Ambassadors please.

him from *Magnentius*, tho' *Magnentius* had detained *Philip* sent from *Constantius*. *Zozimus*, l. 2. See also some Stories in *Cromer*, l. 19. and 21. and *Paruta* about the Ambassadors of *Venice* stopt in their Journey to *France*, l. 7.

(a) *These Privileges only belong to them by the By, as they are Attendants.* See *Fraxinus Canaus's Epistles*, Pag. 75 and 279.

(b) *For they are not to be taken from him by Force.* See *Serranus in Henry 4.*

Proposals of Peace, whom they slew and threw head-long into the Sea, contrary to the Law of Nations. And with abundance of Reason do these Authors express themselves thus: For even in War many Incidents happen, which cannot be negotiated but by Ambassadors, and Peace can scarce ever be made without them.

VII. Ambassadors not Subject to the Law of Retaliation.

VII. Another Question is commonly started, viz. whether an Ambassador may be put to *Death*, or have Violence in any other manner offered him, by the Law of *Retaliation*, for what his *Principal* had done to any Ambassador sent to him from that Court. And indeed there are many Instances to be met with in Histories of Revenge taken after this manner. And no wonder; for not only just and lawful Actions, but unjust, passionate, outrageous ones are mentioned in Histories. Provision is made by the *Law of Nations*, not only for the Honour of the Potentate who sends the Ambassador, but for the Safety of him who is sent: So that there is a sort of *tacit* Covenant also between the *Ambassador*, and the *Potentate* to whom he goes. He may therefore have an *Injury* done him, when none is done to his Principal. And so that Action of *Scipio's* did not only argue a *greatness* of Soul, but was likewise conformable to the *Law of Nations*, who when the *Carthaginian* Ambassadors were brought before him, and he was asked what should be done to them (soon after the *Roman* Ambassadors had been very hardly used at *Carthage*) he answered, (z) *Nothing like what the Carthagini-*

(z) *Nothing like what the Carthaginians did*] Diodorus Siculus in Excerpt. Peires, Σκιπίων, ἐκ, ἔφη, δὲν πείτεν ὁ τοῖς καρχηδονίοις ἐγκάλεσιν, Scipio said they ought not to do that themselves which they condemned the Carthaginians for: And accordingly the Romans, when they found what the Carthaginians had done, let 'em go. See Appianus. And Constantius dismiss'd Titian sent to him

thaginians did. Or according to *Livy*, he said, *He would do nothing unworthy of the Roman Institutions.* In a like case, but a much more ancient one, these words, says *Valerius Maximus*, were spoken by the Roman Consuls, *The Faith of our City, O Hanno, frees thee from that Fear.* For at that time *Cornelius Asina*, contrary to the Right of Ambassage, was put in Chains by the *Carthaginians*.

VIII. 1. The *Attendants* likewise and *Equipage* of Ambassadors are in some measure to be accounted *Sacred*. Hence in the old Form of Instructions to *Heralds* were these words, *Dost thou admit me, O King, as the Royal Messenger of the People of Rome, together with my Attendants and Equipage?* And by the *Julian Law*, not only those who did the Ambassador himself, but even those that did his *Attendants* any Injury, were declared Guilty of a publick Violence. But (a) these *Privileges* only belong to them by the *By*, as they are *Attendants*; and consequently no longer, than the Ambassador pleases. Therefore if his *Attendants* commit any great Crime, he may be required to deliver them up to Justice. (b) For they are not to be taken from him by Force; which being once done by the *Achaians* to some *Spartans* who were in the Roman Ambassador's *Retinue*, the *Romans* cried out, *They have broke the Law of Nations.* Whereunto we may also refer the Opinion of *Salust* concerning *Bomil-*

VIII. That the Rights of Ambassage are to be extended even to the Attendants of Ambassadors, if the Ambassadors please.

him from *Magnentius*, tho' *Magnentius* had detained *Philip* sent from *Constantinus*. *Zozimus*, l. 2. See also some Stories in *Cromer*, l. 19. and 21. and *Paruta* about the Ambassadors of *Venice* stopt in their Journey to *France*, l. 7.

(a) These *Privileges* only belong to them by the *By*, as they are *Attendants*.] See *Fraxinus Canavius's Epistles*, Pag. 75 and 279.

(b) For they are not to be taken from him by Force.] *Serranus* in *Henry 4*.

Bomilcar before quoted. But if the *Ambassador* shall refuse to deliver him up, then are we to proceed in the same manner as is prescribed against the *Ambassador* himself.

2. But whether the *Ambassador* himself shall have *Jurisdiction* over his own *Family*, (c) or may make his House a *Sanctuary* for all such as fly thither for *Refuge*, depends upon the *Concession* of the *Prince*, in whose *Dominions* he resides. For the *Law of Nations* does not give him these *Privileges*.

IX. And
to their
moveable
Goods.

IX. 'Tis more likely that the *Moveables* or *Furniture* of an *Ambassador*, which are all reckon'd *Dependences* of his *Person*, can't be seized upon by way of *Pledge*, or for the *Discharge* of a *Debt*, nor by *Course of Law*, nor even, as some are of *Opinion*, by the *King's* own *Authority* and *Hand*. For no kind of *Compulsion* or *Violence* is to be offered either to him or his, that he may enjoy an *absolute Security* or *Protection*. And therefore, if he shall contract any *Debt*, and have no real *Estate*, (as it commonly happens) to discharge it with, *Application* is to be made to him in a *friendly* manner for the *Payment* of it, and if he refuse to pay it, *Application* is in like manner to be made to his *Principal*. And if he likewise refuse to pay it, then must we in the last Place have resort to such *Remedies*, as are provided against *Debtors* residing in foreign *Countries*.

X. In-
stances of an
Obligati-
on without
the Right of
Compulsion.

X. 1. Neither is there any *Reason* to fear (as some may imagine) that if *Ambassadors* have such *Privileges*, no *Body* will give them *Credit*. For *Kings*, that cannot be compelled, never want *Creditors*;

(c) Or may make his House a Sanctuary.] In this Case there's commonly a *Distinction of Crimes* made. See *Paruta*, l. 10. where the *King of France* very much resenting something of this Nature, is entirely satisfied. See the same Author, l. 9.

ditors; and *Nicolaus Damascenus* says, it was a Custom among some Nations, that for Contracts made upon *Trust*, no Remedy was provided by Law, no more than against Men that prove *ungrateful*. So that People in those Countries were either obliged to sell nothing, but what they were paid for immediately, or to depend upon the bare Word and Honesty of the Buyer. And (d) *Seneca* wishes this Custom would prevail in all Places. *Would to God*, saith he, *that we could persuade Men, not to require their Debts, but only of those, who were willing to pay 'em: I wish that the Buyer could not be bound to the Seller by any Covenant, and that Compacts and Bargains were not kept under Hand and Seal; but that Honesty and Conscience were Security for their Performance.* *Appian* relates of the *Persians*, That they hated *παραχρησμός*, &c. (e) the lending and borrowing of Money, accounting it an Inlet to a thousand Frauds and Falshoods.

2. *Ælian* reports the same thing of the *Indians*; with whom agrees *Strabo* in these words, *Δίκην δὲ μὴ εἶναι* &c. That there are no Courts of Judicature, but for Murders and Injuries, it not being in a Man's Power to hinder these. But as to Contracts and Agreements, it is in the Choice of every one to make them, or refuse them; and therefore if any Man breaks his Word, we are to bear it with Patience. And this ought to make us cautious, whom we give Credit to, but not to fill the City with Law Suits. It was also enacted by *Charondas*, that no Man should have his Action at Law against him, whose Promise he thought fit to take for what he sold him: Which (f) *Plato* likewise approves of. And

VOL. II.

E c

Ari-

(d) *Seneca.*] De beneficiis 3, 15.

(e) The lending and borrowing of Money.] This *Herodotus* in his *Clio* has call'd *παραχρησμός* χρέως.

(f) *Plato.*] S de legibus.

Aristotle observes $\omega\alpha\pi' \epsilon\upsilon\lambda\omicron\iota\varsigma$ &c. That in some Countries there is no Law against Breach of Contracts; for they think, that a Man ought to be content with the Credit of the Person whom he thinks fit to trust. And in another place, $\epsilon\upsilon\iota\alpha\chi\tilde{\sigma} \tau' \epsilon\omicron\iota\upsilon$ &c. There are Laws in some Countries against seeking Redress for the Breach of voluntary Contracts, as if he, with whom we have made any Contract, and whose Word we have taken, were only privately to be dealt with. What is alledged against this Opinion out of the Roman or Civil Law, does not belong to our Ambassadors, but only to Deputies of Provinces or Towns.

XI. How
great this
Right of
Ambassage
is.

XI. Profane Histories are full of Instances of Wars, undertaken for the ill Usage of Ambassadors; and (b) in the Holy Scriptures we read of a War made by King *David* against the *Ammonites*, upon that Account. Neither can there be a juster Cause, as *Cicero* pleads against *Mithridates*.

(g) *Profane Histories.*] The Romans did upon this Account make War upon the People of *Sens*; Appian. Excerpt. legat. 4. and 10. upon the *Illyrians* and the *Genoese*; Polyb. excerpt. legat. 125 and 134. upon the *Issians*; Dion. exc. legat. 11. upon the *Corinthians*; Livy, l. 3. upon the *Tarentines*; Dionysius Halicarn. exc. leg. 4. You have several Examples of the French and Germans in *Aimonius*, l. 3. c. 61, and 88, and in *Withikind*, l. 2.

(h) *In the Holy Scriptures.*] See *Chryst. ad Stagir.* l. 3.

CHAP.

CHAP. XIX.

Of the Right of Burial.

I. 1. FROM the same *voluntary Law of Nations*, arises the Right of *burying* the Bodies of the *dead*. *Dion Chrysostome*, among those Customs, which he opposes to *written Laws*, places this of *Burial*, next to the Rights of *Ambassadors*. And *Seneca the Father*, among those Laws that are *unwritten*, which yet are more firm and lasting than any that are *written*, inserts this of *interring* the dead. The *Jewish Historians*, *Philo* and *Josephus*, call it the *Right of Nature*. And *Isidore Pelusiota*, One of the *Laws of Nature*: As all common Customs, agreeable to natural Reason, are usually termed *Laws of Nature*, as we have observed elsewhere. *Common Nature*, says *Ælian*, commands us to *bury the Dead*. And in another place, *Earth and a Grave are a common Claim, and equally due to all*. *Euripides* in his *Supplikes* calls *Sepulture the Law of Mankind*; *Aristides*, *A common Law*; *Lucan*, *A Ceremony that all Men are intitled to*; *Papinius*, *The Laws of all the Earth, and the Universal Agreement of the World*; *Tacitus*, *The Commerce of Human Nature*; *Lysias the Orator*, *The Common Hope of all*. He that hinders it, is said by *Claudian*, to *divest himself of Humanity*; and by the *Emperor Leo*, to *disgrace his Nature*; and by *Isidore of Pelusium* τὸ ὅσταν ὑβρίζαν, to *violate all that's Sacred*.

I. From the same Law of Nations arises the Right of burying the Dead.

2. And because the Ancients derived the Original of those Rights, that are common to all civilized Nations, from the Gods, to the End they
E c 2 might

(a) The Laws of Men.] φύσεως θεομύς, the Laws of Nature, Euseb. Hist. 8, 19.

might be accounted the more Sacred; as they did the Rights of *Ambassage*, so we see this Right of *Burial* every where ascribed to the Gods. In the Tragedy of *Euripides* before quoted, you may find it called (b) νόμον δαιμόνων, *The Law of the Gods*. And in *Sophocles*, *Antigone* makes this Answer to *Creon*, who denied *Polynice* Burial:

*For these Decrees were neither made by Jove,
Nor by th' Infernal Gods, from whom Mankind
All other Rights derive. Nor did I think
The Pow'r of Mortal Man so great, that Laws
Not written, but acknowledg'd by the Gods
To be Eternal, it could violate.
Why then should I, deterr'd by Mortal Rage,
Neglect to see the heav'nly Powers obey'd?*

3. *Isocrates* treating of the Grounds of that War which *Theseus* made against *Creon*, speaks thus *Who is ignorant, who hath not been taught even in the Bacchanalia by the Dramatic Poets, what Misfortunes happened to Adrastus before Thebes, when attempting to reduce Oedipus's Son, but his Son-in-law, he lost most of his Army, and saw his Captain slain? He with Disgrace surviving, and not being able to obtain a Truce to bury his Dead, came a Supplicant to Athens (which was then governed by Theseus) and begged of him not to let those brave Men lye unburied nor to suffer the ancient Custom to be despised, and the common Right violated, which all Mankind might lay claim to, not being instituted by an Human, but a Divine Power: which when Theseus heard, he forthwith sent his Ambassadors to Thebes. The same Author immediately after,*

(b) Νόμον δαιμόνων.) *Sophocles* in his *Ajax*. And in his *Antigone* he calls it δαίμων νόμος.

after, (c) blames the *Thebans* for preferring the Decrees of their *State*, before the Laws of the *Gods*. He likewise makes mention of the same Story in other Parts of his Works; and so do *Herodotus*, *Diodorus Siculus*, *Xenophon*, *Lysias*, and *Aristides*, who all unanimously agree, that this War was undertaken to vindicate the Honour of *Human Nature*.

4. And we find every where, in the most Authentick Authors, this good Office of *burying* the dead highly commended. For *Cicero*, and (d) *Lactantius*, call it an Act of *Humanity*; *Valerius Maximus*, of *Humanity and Civility*; *Quintilian*, of *Humanity and Religion*; *Seneca*, of *Humanity and Compassion*; *Philo*, of *Commiseration of common Nature*; *Ulpian*, of *Mercy and Piety*; *Modestinus* terms it a *Memorial of our mortal State*; *Capitolinus*, an Act of *Mercy*; *Euripides* and *Lactantius*, of *Justice*; and *Prudentius*, of *Liberality or Charity*. *Optatus Milevitanus* accuses the *Donatists* of *Impiety*, for denying *Burial* to the Bodies of *Catholicks*.

———— Creon must be beat
By Dint of Arms to Manners and to Man. Papin.

Such Men, saith *Spartianus*, have no regard to *Humanity*; *Livy* calls it a *Cruelty*, to which it is scarce credible, that any Man's Anger or Revenge should hurry him; and (e) *Homer*, ἀνεία ἔργα,
E e 3 an

(c) *Blames the Thebans.*] *Plutarch* in his *Theseus* will have it, that they obtain'd the Privilege of *Burying* from the *Thebans* by *Contract*, and not by Force of Arms. But *Pausanias* in his *Artici* says 'twas by Force of Arms.

(d) *Lactantius.*] Who has this Expression too, l. 6. c. 12, *That last and greatest Act of Piety, to bury Strangers and the Poor.*

(e) *Homer*, ἀνεία ἔργα.] The same Author in his 24th *Iliad*, says, that *Jupiter* and the *Gods* were Angry with *Achilles* for not using *Hector's Body* so handsomely as he ought.

an indecent thing. *Laſtantiuſ* condemns the Wiſdom of thoſe Men, as favouring too much of Impiety, who would make it ſuperfluous to bury the Dead. Upon the ſame account *Eteocleſ* is called *impious* by *Papiniuſ*.

II. From
whence this
Cuſtom
comes.

II. 1. From whence this Cuſtom of *burying* the dead took its riſe, whether they were firſt *em-balmed*, as amongſt the *Aegyptians*, or *burnt*, as among the *Greeks*, or only *interred* as they are now (which *Cicero*, and after him (f) *Pliny*, hold to be the moſt ancient Cuſtom) is not agreed upon. *Mofchion* attributes it to the Savage Cruelty of the *Giants*, who uſ'd to devour the dead Bodies of Men, the Abolition whereof is ſignified by *Burial*; for thus he ſpeaks,

—————'Twas then by Laws decreed,
The Dead ſhould be interr'd, or o'er the Corpſe
Aſhes be ſtrew'd;
The mangled Refuſe of the late Paſt
To ſcreen from Human Eye.

2. Others are of Opinion, that Men, by *burying* the dead, do as it were of their own accord pay a *Debt*, which the *Law of Nature* would otherwiſe require of them, tho' they were unwilling. For that, Man's Body (g) being taken from the Earth, ſhould

(f) *Pliny*.] *Hiſt. Natur.* 7. 54. where there's alſo this Paſſage By Burying is meant any kind of privately diſpoſing of the Body; but by Interment, when 'tis laid in the Ground.

(g) Being taken from the Earth, ſhould be reſtor'd to the Earth again.] *Joh* 10. 9. And *Philo* againſt *Flaccuſ*, ἀνδραπότοις ἢ οὐσίς &c. Nature has ordained the Earth as Man's proper Place. not only while he lives, but alſo when he is dead, that ſhe who receives us at our coming into the World, may receive us too at our going out. But as there is no laudable Action done by Man, of which God has not imprinted ſome Similitude in one kind of Beaſts or other. ſo does it likewiſe happen in this very Affair. *Pliny* reports of *Pifnires*, l. 11. 30. that they

should be restored to the Earth again, was not only declared by God to Adam, but all the Greek and Latin Writers do universally acknowledge it. Thus Cicero out of Euripides's *Hyppisile*:

————— Earth must be
To Earth restor'd. —————

which also are the very words of Solomon, *Then shall the Dust return to the Earth as it was, and the Spirit shall return unto God who gave it.* Euripides being upon this very Subject, in the Person of *Theus* speaks thus in his *Supplices*:

*Permit the Slain to find a peaceful Grave:
All things to that, which gave them Birth, return.
To Heav'n soars up the pure ætherial Mind,
The mortal Part to Parent Earth descends;
'Tis fit it should be so. For Life to Man,
Not as a Property, but Loan, is giv'n:
And strait the Earth her Foster Child resumes.*

Lucretius likewise calls the Earth,

The teeming Womb and common Grave of all.

Cicero, in his second Book of Laws, has quoted this Passage out of *Xenophon*, *The Body is restored*

E c 4

to

they only, besides Men. of any Creature, bury one another. And yet he himself speaking of the Dolphins says, l. 9, 8. that they are seen carrying away their Dead, for fear some Ravenous Fish or Beast should tear it in pieces. And *Virgil* of the Bees has this remarkable Observation,

*And Crowds of Dead, that never must return
To their lov'd Hives in Decent Pomp are born:
Their Friends attend the Hearse, the next Relations mourn.*

Dryd.

Servius, with all the Solemnity of a Funeral.

to the Earth, and being placed in an hospitable Grave, is as it were covered with its Mother's Veil. Pliny likewise tells us, that the Earth receives us at our Birth, nourishes us after we are Born, sustains us brought up, and at last being forsaken of all the World, she, like a tender Mother, takes us into her Bosom, and covers and secures us there.

3. Some think, that the Hopes of a Resurrection were by our first Parents signified to their Posterity by this Emblem of Burial. For Pliny testifies that Democritus taught, that Men's Bodies should be deposited in the Earth, by Reason of a Promise given them of their being restored to Life again. And Christians also do often attribute this Custom of decently burying the Dead to their Hopes of a Resurrection. Thus Prudentius,

*What means that sumptuous Mausolæum there,
And this fine stately Tomb erected here,
Unless those lodg'd within, not Dead but Sleeping are?*

4. But what seems the most plain and obvious Reason is, that since Man is the most noble of all living Creatures, it was not fit that his Body should be torn in Pieces and devoured by Beasts. Wherefore Burial was found out that this might be avoided, as much as possible. By the Compassion of Men, saith Quintilian, dead Bodies are preserved (b) from the Depredations of Birds and Beasts.

So

(b) From the Depredations of Birds and Beasts.] See the Prophecy about Jeroboam's Posterity for the Punishment of his Sins, 1 Kings xiv. 11. And Tertullian on the Resurrection. Homer in his 3d Odyss.

Τῶ χ' ἔδῃ Σαρύνη &c.

*When Dead, not a few Ashes would they give,
Nor one small Turf to screen th' unhappy Corps;
But all expos'd to Dogs and Fowl a Prey
They left it.*

So Cicero, Being torn by wild Beasts, he wanted even the common Honour of Burial. And Virgil,

Lie there inglorious and without a Tomb,
Far from thy Mother and thy native Home,
Expos'd to savage Beasts and Birds of Prey,
Or thrown for Food to Monsters of the Sea. Dryd.

And God himself threatens some wicked Kings by his Prophets, that they should be buried with the Burial of an Ass, and that the Dogs should lick their Blood. Nor has Lactantius regard to any thing in Burial, but the Dignity of Human Nature, when he saith, *We cannot suffer the Image of God to lie as a Prey to wild Beasts and Fowls of the Air.* And

He speaks of *Ægisthus*, whom as an Adulterer, and the Usurper of the Crown, the *Argives* had thrown out unburied, but whose Remains were afterwards interr'd by the more Compassionate *Orestes*, as you'll hear by and By. *Menelaus*, in *Sophocles*, of *Ajax*:

Ἄλλ' ἀμφὶ χλωρῶν &c.

But let his Carcase

Rot on these Yellow Sands, and feed the Fowl
Which haunt the Beech, or swim the liquid Deep.

But this too *Ulysses*, a Precedent of singular Prudence, does forbid there. And *Sophocles* in his *Antigone*, to her great Praise, says:

Ἦτις ἢ ἀυτῷ ἀδελφόν &c.

Nor would she let her Murthered Brother lye
Unbury'd, a Prey to Voracious Dogs
Or Birds of Rapine.

Appian Civil. 1. of some People Slain by *Marius's* Order, τὰ φόν τε ἀδενὶ &c. Nor was any one permitted to give any of the Persons kill'd common Burial, but such Men as these were left to the mangling Mercy of Birds and Dogs. *Ammianus Marcellinus* at the beginning of his 8th B. speaking of *Julian*, And for fear that the Ravenous Fowl should devour the Bodies of the Slain, he commanded 'em all without Distinction to be put into the Ground.

And St. Ambrose, *Nothing is more excellent than to do this good Office for him, who cannot requite thee; to defend the Body of thy Companion in Nature from the Fowls and from the Beasts.*

5. But suppose there was no Fear of any such Injury, yet to suffer a Man's Body to rot above Ground, and to be trodden under Foot, is an *Indignity* offered to *Human Nature*. Agreeable to this is that Saying of Sopater in his *Controversies*, ὅτι τὸ θάπτειν καλόν, &c. that to bury the Dead is a very decent thing, and instituted by Nature it self, lest the Bodies of Men after Death being naked, should be exposed to Shame and Reproach. And they that do this Honour to the Bodies of the dead, perform an Office of Humanity acceptable to all, whether Gods, or Heroes. For it is not agreeable to Reason, that the Secrets of Human Nature should after Death be exposed to publick View. Hence was derived that ancient Custom of burying the dead, that being laid under Ground, we might not see them rot and moulder away. The like Reason is given by Gregory Nyssen, in his Letter to Letorius, *We bury the dead, saith he, that (i) the Shame of Human Nature may not lie exposed to the Face of the Sun.*

6. Hence it is, that this good Office of Burial is said to be performed, not so much to the Man, i. e. the particular Person buried, (k) as to Humanity, i. e. Human Nature in general. Wherefore

Seneca

(i) *The Shame of Human Nature.*] Upon the same Account Agathias says it is a Custom τὰ δεικνυμένα τῶν ὀδόντων ἐπικαλύπτειν, to cover and hide what comes from a Woman in Labour. Thus does it appear both at our Birth and our Death how very a *Nothing* we are by Nature. To denote which the wise Hebrews injoin'd that all People, both of the highest and lowest Condition, when just born or deceased, should be habited and wrapped up alike.

(k) *As to Humanity. i. e. Human Nature in general.*] Servius upon the 11th Æneid. For Sepulture is a Benefit that all Mankind is intitled to.

Seneca and *Quintilian* called Burial a piece of public Humanity; and *Petronius*, a Piece of Humanity deriv'd down to us from our Ancestors. From all which Instances we may conclude, that Sepulture is not to be denied either to our private or public Enemies. As to private Enemies, there is a remarkable Contest in *Sophocles* about interring *Ajax*, where *Ulysses* thus speaks to *Menelaus*,

O *Menelaus*, do not sully all
That you have spoke, by injuring the Dead.

The Reason whereof is given by *Euripides*, in his *Antigone* thus,

To ev'ry Mortal Death's the End of Strife;
For what Revenge can you desire more?

So in his *Supplices*,

If the Argives did you Wrong; they're fallen,
And that's Revenge enough for any Foe.

And *Virgil*,

With dead and vanquish'd Foes no War is made.

Which Verse the Author to *Herennius* has quoted, and gives this Reason for it; For that, saith he, which is the last and greatest of Evils has already befallen them. With whom agrees *Papinius*.

We've been at War, 'tis true;
But Wrath and Hate by Death are done away.

The same Reason is given by *Optatus Milevitanus*, Tho' your Passion was implacable while your Enemy lived, yet it should end with his Death; for he is now silent with whom you used to contend.

III. 1. (1) And

III. 'Tis
due even to
Enemies.

III. I. (I) And therefore it is agreed upon by all, that Burial is due even to our publick Enemies. This, saith Appian, is a common Right in all Wars; and Philo calls it, the Commerce of War. Tacitus, Our very Enemies do not envy us Graves. Dion Chrysostome, This is a Right religiously observed even amongst Enemies, though their Enmity was irreconcilable before. Lucan treating upon this Subject, saith, That Funeral Rites are to be celebrated even for Enemies. And Sopater to the same purpose, What War, saith he, can be so barbarous as to rob Mankind of its last Honour? What Enmity can extend the Resentment of Injuries so far, as to dare to violate this Law? Whereunto we may add that of Dion Chrysostome, whom we have just now quoted; By this Law, saith he, the dead are not accounted Enemies, nor does any Man extend his Anger and Revenge to the Bodies of the slain.

2. (m) Instances of this are every where to be met with. Thus Hercules buried his Enemies; Alexander, those he had slain at Issus; Hannibal made a Search for the Romans, C. Flaminius, P. Aemilius, T. Gracchus, and (n) Marcellus, to give them Burial. You would have thought, says Silius Italicus,

(I) And therefore it is agreed upon by all, that Burial is due even to our publick Enemies.] Philo against Flaccus: ἡδὲ καὶ τὰς πολεμικὰς &c. Even to Foes who fall in Battle do Men usually allow the Right of Interment. The generous and Good-natur'd will bury 'em at their own Expence; and others, who extend their Hatred even beyond Death, will yet upon certain Conditions deliver up their Bodies, that they may not be depriv'd of that Honour, which the Laws and Customs have every where indulg'd 'em.

(m) Instances of this are every where to be met with.] Josephus in legibus; καὶ τὰς πολεμικὰς καὶ οἱ πολέμιοι, Let even your Enemies be bury'd. Agamemnon, in the viith Iliad, buries the Trojans; Antigonus, in Plutarch, does the same to Pyrrhus. See that Author in his Life of Theseus.

(n) Marcellus.] Plutarch in his Marcellus.

Italicus, that it had been some Carthaginian Captain that had been slain. The very same was done by the Romans to Hanno the Carthaginian; to Mithridates by Pompey; by Demetrius, to many of his Enemies; and by Anthony to King Archelaus. This was part of the Oath, which the Greeks took, when they made War with the Persians. I will bury all my Fellow-Soldiers, and if I come off Victorious, the very Barbarians. And all Histories abound with Instances of (o) a Suspension of Arms obtained for taking away the Dead. The Athenians in Pausanias, say, That they buried the Medes themselves; because all dead Bodies, whether of Friends or Foes, have a Right to be interred.

3. Wherefore according to the Exposition of the Rabbi's, the High-Priest, though he was forbidden to be present at Funerals upon any other Occasion, yet, (p) if a Man were found dead and unburied, he was commanded to bury him himself. And Christians have had so great Regard to this Duty, that, rather than fail of performing it, they have thought it lawful to melt down or sell their consecrated Plate, which they never did, but for the Relief of the Poor, or the Redemption of Captives.

4. Some Instances may be found for the contrary Opinion, but they are only such as are condemned by the general Voice of Mankind.

(q) *O save me from this Rage, 'tis all I ask!*
is in *Virgil*.

Stript

(o) *A Suspension of Arms obtain'd for taking away the Dead.]* See below Book iii. ch. xx. §. 45.

(p) *If a Man were found dead and unburied, he was commanded to bury him himself.]* Servius observes the same out of the Roman Pontifical Law.

(p) *O save me from this Rage.]* Servius interprets this, the Fury of his Enemies, which would even after his Death desire to insult him.

*Strip of the Man, the cruel Wretch deny'd
The Slain a little Dust:*

in *Claudian*. Wherewith agrees that of *Diodorus Siculus*, 'Tis savage Cruelty to wage War with the dead, who were lately of the same Nature with our selves.

IV. Whether even to
notorious
Malefactors.

IV. 1. Some Doubt indeed might have been made concerning notorious *Malefactors*, if the *Divine* Law, given to the *Hebrews*, which as it is the Rule of all other *Virtues*, so is it likewise of *Humanity*, had not commanded, that those very Men that were hanged upon the *Gallows* (which was reckoned a Circumstance of the greatest Ignominy, *Numb. xxv. 4. Deut. xxi. 23. 2 Sam. xxi. 26.*) should be buried the same Day. Hence *Josephus* also observes, that the *Jews* were so careful to bury their dead, that they took down even the *Bodies* of those, who were executed by publick Justice, before the setting of the *Sun*, and interred them; and some other of the *Hebrew* Interpreters add, that they did this out of Reverence to the Image of God, wherein Man was created. *Homer* in his *iiiid Odyss* relates, that *Ægysthus*, who to the Sin of *Adultery* had added that even of the King's Murder, was notwithstanding by *Orestes* the slain King's Son buried. And even among the *Romans*, *Ulpian* informs us, the *Bodies* of executed *Malefactors* could not be denied to their Relations, if they required them; nay, *Paulus* the Lawyer was of Opinion, that they were to be given to any that should ask them. And even *Dioclesian* and *Maximilian* the Emperors gave this Answer (r) *We do not,*

(r) *We do not deny Burial.* This Custom of the *Romans* is mention'd in *Philo* against *Flaccus*.

not, say they, deny Burial to those Criminals, who have deservedly been put to Death.

2. In some Histories indeed we meet with Instances of those (s) who have been cast out *unburied*, but this is oftner done in *Civil*, than in *Foreign Wars*; and tho' we sometimes see the Bodies of notorious *Malefactors* hung in *Chains*, to deter others; yet whether this be a laudable Custom or not, is much disputed, not only by *Politicians* but *Divines*.

3. On the contrary, we find those commended who have ordered the Bodies of those very Men to be buried, that had denied Burial to others; as *Pausanias* King of the *Spartans*, who, being incited by the *Ageneti* to retaliate the Barbarity of the *Persians* towards *Leonidas*, rejected their Counsel, as unworthy of himself and the *Grecian Honour*. *Theseus* thus speaks to *Creon* in *Papin*us:

Go forth and meet, the last of Ills, thy Fate,
Yet of a Grave secure.

The *Pharisees* buried King *Alexander Jannæus*, who had used the Bodies of their dead Countrymen very barbarously. And though God hath sometimes punished some Persons with the *Loss* of *Burial*, yet this he did by his own peculiar Right, as his Authority is *above* all *Laws*. And whereas *David* kept the Head of *Goliath* to shew it, as a Token of his Victory, this was done to an *Alien*, to a Contemner of the true God, and under that Law wherein the Word *Neighbour* was confined to the *Hebrews* alone.

V. 1. There

(s) Who have been cast out unbury'd.] This *Josephus* in his Account of the Death of *Alexander* King of the *Jews*, has term'd *ἀταμία ψέλζειν ἢ νεκρῶν*, to affront the Dead by Non-Interment. Add *Quintilian* Declam. iv.

V. Whether also to those who kill themselves.

V. 1. There is however this one Thing remarkable concerning Burial, that in the *Jewish* Law an Exception was made of those who laid violent Hands upon *themselves*, as *Josephus* informs us. And no Wonder, since no other *Punishment* can possibly be inflicted upon them who esteem *Death* it self to be none. Thus were the *Milesian* Virgins deterr'd from killing themselves; and (t) the *meaner* People of *Rome* formerly, though *Pliny* is for disproving it. Thus did *Ptolomy* command the Body of *Cleomenes*, who had killed himself, to be *hanged*. And (u) it is every where Customary, says *Aristotle*, to brand those with some Mark of Ignominy, who murder themselves; which *Andronicus Rhodius* explains, of prohibiting them *Burial*. And this Law, among many others enacted by *Demonassa*, Queen of *Cyprus*, is highly commended by *Dion Chrysostome*. Neither is it to the purpose to object with *Homer*, *Æschylus*, *Sophocles*, *Moschion* and others, that the dead are deprived of all Sense, and therefore can neither be affected with Pain nor Shame: For it is sufficient, if what is done to the *dead*, strike a Terror into the *living*, so as to discourage them from the Crime.

2. For

(t) *The meaner People of Rome formerly.*] *Servius* upon the xiith *Æneid*: We must know indeed, that it was provided by the Pontifical Laws, that whoever hang'd himself, should be cast out unburied. And therefore he very justly Styles it, *Informis Letbi*, an Ugly Death, as being the most Infamous one in the World. Since there's nothing Uglier than this Death, we must believe that the Poet spoke so in Relation to the Majesty of the Queen. But *Cassius Hemina* says, that *Tarquinius Superbus*, after he had forced the People to make Common-Sewers, and many of 'em had hang'd themselves to escape the Indignity, order'd their Bodies to be affix'd to a Cross. Then was it first reckon'd Dishonourable for a Man to lay Violent Hands upon himself.

(u) *It is every where Customary.*] At *Athens* in *Æschines's* Days, if a Man had murder'd himself, his Hand was buried separate from his Body. *Æschin.* in *Ctesiphon*. Add to this, *Hegeſip.* l. iii. c. 17.

2. For the *Platonists* do argue excellently well against the *Stoicks*, and such as hold it *lawful* for a Man to kill himself to avoid *Slavery* or the Pains of an acute *Distemper* or even out of Hopes of acquiring *Glory*, by maintaining, that the *Soul* is to be kept in the safe Custody of the *Body*, and not to be dismissed, but by the *Command* of him, who first gave it. Which Point is fully discussed by *Plotinus*, *Olympiodorus* and *Macrobius* upon *Scipio's Dream*. *Brutus*, following this Opinion, (x) had formerly condemned the Fact of *Cato*, tho' he afterwards imitated it himself. It is neither pious nor manly, saith he, to yield to adverse Fortune, and to fly away from those Calamities, which we should magnanimously bear. And *Megasthenes* observed, that the Fact of *Calanus* was by the wisest of the *Indians* condemned, it being contrary to their Laws (y) for any Man through Impatience to kill himself. Neither did the *Persians* approve of it; as appears by these Words of *Darius* in *Curtius*: *I had rather die by another Man's Crime, than my own.*

3. And therefore, to die was by the *Hebrews* called ἀπολύεσθαι to be let go, or, to be dismiss'd, as is plain not only from *Luke* ii. 29. but from the

VOL. II.

F f

Septuagint

(x) Had formerly condemn'd.] And a great many Philosophers, except the *Stoicks*. *Seneca* Epist. lxx. You will meet too with several Men of Eminent and profess'd Wisdom, who deny that one ought ever to offer Violence to his own Life and who declare it as their Opinion that a Self-murderer is guilty of an Impious and wicked Action. That we ought to wait for that End, which Nature has design'd us. *Procopius* Gothic. iv. βίατες καταστροφή &c. 'Tis an Unprofitable, Rash and Imprudent Thing for a Man to force his way out of the World; and this Thoughtless Bravery of courting Death is look'd upon by all Men of Good Sense to have only usurp'd the Name of Courage. Nor is it altogether unworthy your Reflection, to consider whether in so doing, you do not play the Fool against God.

(y) For any Man through Impatience to kill himself.] This was no less the Opinion of the *Arabians* than of the *Indians* and *Persians*, as you may learn from *Job* iii. 21.

Septuagint Version of Gen. xv. 2. and Numbers xx. about the End. Which way of Expression is also usual amongst the Greeks. He that dies, saith Themistius (de Anima) is said by them to be dismiss, and Death they call a Dismission. We meet with much such an Expression also in Plutarich (de Consolatione) until God himself shall dismiss us.

4. (z) Yet some of the *Hebrews* except one Case out of the Law against *Self-murder*, as a kind of commendable Transport, εὐλογον ἑξαγωνην, when a Man plainly perceives, that his Life is like to be nothing for the future but a Reproach to God himself. For since it is concluded, that the Right over our own *Lives* is not in our *selves*, but in God; as *Josephus* has truly taught; they are of Opinion, that the Will of God, made known to us by sure Tokens, is the only lawful Reason why a Man should hasten his Death. To this purpose they alledge the Example of *Sampson*, who found, that the true Religion was made a mock of in his Person; and that of *Saul*, who fell upon his own Sword, that he might not be insulted by His and God's Enemies. For they will have it, that he repented as soon as *Samuel's* Ghost had foretold him his Death, and although he knew he should die in Case he did fight, yet that he would not refuse to fight for his Country and the Law of God, having obtained eternal Praise thereby, as *David*

David himself declares. And hence it was, that he so highly commends those who had given Saul an honourable Burial. A third Instance we have in Razes a Senator of Jerusalem, as it is recorded in the History of the Maccabees. Instances are likewise to be met with in Ecclesiastical History of those that killed themselves, (a) lest being put upon the Rack they should abjure the Christian Faith; and of Virgins, who, (b) to preserve their Chastity, have thrown themselves into Rivers; whom notwithstanding the Church has thought fit to canonize as Martyrs. But yet it is worth while to see (c) what St. Austin thinks of these People.

F f 2

f. I

(a) Lest being put upon the Rack they should abjure the Christian Faith.] See Eusebius.

(b) To preserve their Chastity.] Cicero in his Oration de Provinciis Consularibus gives an Account of some Maids of Quality who threw themselves into Wells, and so by a Voluntary Death, kept themselves from being Raviſh'd. Such another Story does St. Jerom against Jovinian relate of the Milesian Virgins; and there's an old Epigram to the same purpose, Antholog. l. iii. tit. de juvenibus, beginning with ἀρχομένης ὁ Μίλαντος. And the Jews tell you of a Woman in a Ship importun'd to Adultery, who when she had ask'd her Husband, whether Bodies that are drown'd in the Sea, would rise again, and he had answer'd, that they would, threw her self into the Sea. We have many Instances of this kind amongst Christian Women. As, the Women of Antioch under Dioclesian, Sophronia under Maxentius; several in the Martyrologies (Zonar) under Sextus Aurelius. Procopius, Perfic. ii. adds other Antiochenes under Chosroes. And St. Ambrose commends the Virgins, who at the Expence of their Lives maintain'd their Honour. St. Jerom in his Commentaries at the End of the first Chapter of Jonah says, And therefore in Persecutions 'tis not lawful for me to kill my self, unless when my Chastity is Danger without it.

(c) What St. Austin thinks of these People.] To whom we may add St. Chrysostom, Gal. i. 4. and the third Council of Orleans; 'Tis our Judgment, that the Offerings of Persons deceas'd, though they were killed in the actual Commission of a Crime, ought to be accepted, unless they are prov'd so have laid violent Hands upon themselves. And yet this very St. Austin, l. i. de civitat. Dei c. 16. says, But, how

5. I find also, that another Exception to the general Rule of *burying the dead* prevailed among the *Greeks*, which the *Locrians* objected against the *Phocians*, viz. that it was a Custom common to all *Greece* to cast out *sacrilegious Persons unburied*. The like doth *Dion Præseensis* report of such as were *Atheists* and notoriously *impious*. And *Plutarch*, that the very same Punishment was established by Law in *Athens* (d) against *Traitors*. But to return to my Design; ancient Writers do generally agree, that it is lawful to go to *War* with any Prince, that denies *Burial* to the dead, as appears by that Story of *Theseus*, which is recorded by *Euripides* and *Isocrates*, in the Places before cited.

What
her Rights
long to us
the Law
of Nations.

VI. There are also other Rights belonging to us by the *Voluntary Law of Nations*, as what we have been possessed of a long Time, what comes to us by *Contract*, though made upon very *unequal Terms*, and to succeed to the Estate of an *Intestate Person*. For all these, though they have their Rise in some Measure from the *Law of Nature*,

ever, if the Case be so, that they destroy'd themselves, purely that they might not suffer any Indecency of this Nature; who of *Common Humanity* could be so *Barbarous* as to, be unwilling to have 'em pardoned? And the *Capitulare Francicum* l. vi. 70. It has been debated and resolv'd. in Relation to him who murders or hangs himself, that if any one, Compassionating his unhappy Circumstances, will on that Account give any Alms, he may, if he pleases do so, and pray for him in the *Psalmodes*: but as for them themselves let 'em be without either Offerings or Masses: For God's Judgments are Unsearchable, and his ways past finding out! See there too, vii. 443.

(d) Against Traitors.] But when *Nicetas* has in his third Book of the Life of *Alexius Isaccius's* Brother, related the Death of *Johnannes Comnenus Crassus*, who by Sedition had affected the Crown, he speaks of him in the following manner; μετὰ δὲ τὸ σφαγεῖν &c. After his Body was remov'd thence, 'twas made the Food of Dogs and Birds; which was however look'd upon by all the World as a thing a little Brutish and Inhuman.

yet do they receive an *additional* Confirmation from *Human Laws*, whether against the Uncertainty of *Conjecture* or *Probability*, or against some Exceptions, which *Natural Reason* might perhaps suggest; as we have already shewn when we treated of the *Law of Nature*.

CHAP. XX.

Of Punishments.

I. **W**HEN we undertook, above, to assign the *Causes of War*, we laid down, that *Injuries* done might be consider'd in a *Twofold* Respect, either as they may be *repair'd* or *punish'd*. Of the *former* we have already fully treated. We come now to the *later*, that of *Punishment*; which we shall the more accurately discuss, for as much as its *Origine* and *Nature* being misunderstood has given Occasion to many Mistakes. *Punishment* then in its general Acceptation is *the Evil that we suffer for the Evil that we do*. For tho' some sorts of *Labour* or *Work* are often impos'd on Persons instead of *Punishment*, yet considering the Pains and Trouble that attend such Labour and Work, they may properly enough be call'd *Punishments*. As for those *Hardships*, which some Folks suffer for a *Contagious* Distemper, for being *maim'd*, or for any other *Uncleanneſs* (many kinds of which are extant in the *Jewish Law*) so as, for Instance, to be *driven* from all *Company* and *Conversation*, or to be made *incapable* of any *Office* or *Employment*, they are not properly *Punishments*, though for some *Resemblance* they have to them, and by an *Abuse* of the Word, they are so called.

I. The
definition and
Origin
Punishment.

1, de exilio,

2. Among those Things, which Nature herself tells us to be *lawful* and *just*, this is one, That he that *doth* Evil should *suffer* Evil, which the Philosophers call the most ancient and the *Rhamantbean* Law, as we have said elsewhere. To the same purpose is that Saying of *Plutarch*, τὸ Θεῷ ἐπεται δίκη &c. *Justice is the Attendant of God to take Vengeance of those who transgress the divine Law, which all Men naturally have Recourse to against all Men as their Fellow Citizens.* And (a) *Plato*, neither God nor Man ever said this, that he, who hath done wrong, doth not deserve to suffer for it. And *Hierax* describes Justice by this as by the noblest Part of it, viz. that it is the *Exaction of Punishment on those, who have first offended.* And *Hierocles* calls Punishment the *Medicine of Wickedness.* (b) And *Lactantius* says, *They are guilty of no small Error, who miscale Punishment, either Human or Divine, by the Name of Bitterness and Malice, imagining that he ought to be esteemed guilty, who only punishes the guilty.*

3. But what we have said of *Punishment*, which is properly so called, must necessarily be the consequence of some Crime or Demerit, as *St. Austin* has observed, *All Punishment, if it be just, must be the Punishment of some Crime*; which is true even of those Punishments that are inflicted by God himself, tho' sometimes thro' our Ignorance, the Offence is concealed where the Punishment is evident, as the same Author speaks.

(a) *Plato.*] *St. Irenaeus's* Expositor in his third Book, chap. xiv. has set down his Words thus: *And God, as a very Ancient Report goes, having the beginning and the Means of all Things at his Disposal, brings 'em to a just Perfection, visiting 'em according to their Respective Nature, always attended with Justice ready to punish those who presume to deviate from the Law the Almighty has given.*

(b) *And Lactantius says*] Agreeable to this is that of *Belisarius* in *Procopius's* Vandal. 1. τὸ ποῦν δ' αὖ τῷ &c. *Let it be the first Maxim of Justice to punish Murderers.* Add here *Agathias*, l. v. where he speaks of *Anatolius*,

II. 1. But whether *Punishment* belongs to *Distributive* or *Expletive* Justice, divers Men are of divers Opinions. Some imagine, that because greater Offenders are to be more severely punished, and so on the contrary, and because Punishment proceeds as it were from the whole or the Community, to a Part or Member of that Community, therefore they would ascribe it to *Distributive* Justice.

II. That Punishment belongs to Expletive Justice, and how.

2. But what in the first Place they lay down, that where there is a Geometrical Proportion, it always appertains to *Distributive* Justice, we have shewn in the beginning of this Work not to hold true. Besides, that greater Offenders are more severely punished, and lesser Offenders more lightly, falls out only by *Consequence*, and is not *primarily* and of it self intended: For that which is simply and in the first place intended, is (c) an Equality be-

F f 4

tween

(c) *An Equality between the Offence and the Punishment.* Seneca de Ira 2, 6. He would be unjust to bear one and the same *Resentment*, when the Crimes are unequal. Tacitus Anth. 3. Tho' his Crimes are beyond Measure flagrant yet the Prince's Moderation, and yours, and your Ancestors Examples, will qualifie the Punishments. There's a Difference between what is only vain, and what is downright wicked; what is only ill said, and what is ill done: There may such a way be found to punish him, as shall neither give us any Check or Reproach for our Clemency on the one hand nor our Severity on the other. Ammianus, l. 28. Praying that their Punishment might not be greater than their Offence. The Scholiast upon Horace, If great Punishments be laid out upon small Crimes, great Crimes must either remain unpunish'd, or some new Punishments must be invented for 'em. And Lex Wisigoth. l. 12. tit. 3. cap. 1. For some Laws, tho' they take Notice of a great variety of Faults, are yet not so distinguishing in their Punishments of 'em but several Crimes are obnoxious to one and the same Penalty only. Nor is the Punishment at all proportion'd to the Trespas, since a greater or a less Crime ought not to be alike in their Sufferings: And especially when our Lord does in his Law expressly ordain that the Number and Measure of Stripes shall be according to the Degree and Nature of the Offence. See below in this Chap. §. 28. and 32. and in Bigl. Ch. 11. §. 1.

tween the Offence and the Punishment; whereof Horace thus,

*Why doth not Reason poise and mend the Thoughts,
And see our Rage proportion'd to the Faults?*

Creech.

And elsewhere,

*Let Rules be fix'd, that may our Rage contain,
And punish Faults with a proportion'd Pain;
And do not flea him, do not run him through,
That only doth deserve a Kick or two.* Creech.

And 'tis to this that the Divine Law *Deut. xv.* and *Leo's Novell* have a Regard.

2. Neither is the other Position much truer, that Punishment doth always proceed from the *whole* to a *part*, as will appear by what we shall say hereafter. Besides we have already shewn, that the true Nature of *Distributive Justice* consists, neither in such an *Equality*, nor in a Procession from the *whole* to a *part*, properly speaking, but in considering the *Aptitude* or *Fitness* of a Delinquent for *Punishment*, which doth not contain in it a *Right* strictly so called, but gives Occasion to it. For although he that is punished, ought to *deserve* Punishment, yet can we not infer from hence, that he must necessarily undergo whatsoever *distributive Justice* may require of him. Neither do they, who would have Punishment to appertain to *expletive*, or what is commonly called *Commutative Justice*, explain themselves much better. For they look upon it in such a Light, as if *Punishment* was due to a *Delinquent* in the same manner, that a *Debt* is due upon a *Contract*. The vulgar Expression, whereby we say, that *Punishment is due to a Malefactor*, which is very improper, has led them into this Error. For he to whom any thing is *due*, hath a *Right* against him from whom

whom it is due. But when we say that *Punishment* is due to any one, we mean no more, than that it is *fit* he should be *punished*.

3. Yet it is true that *Commutative* Justice is primarily and of it self conversant about *Punishments*, forasmuch as he that *punishes*, if he punish *justly*, must have a *Right* to punish, which *Right* arises from the *Crime* of the *Delinquent*. And herein there is another thing (*d*) that comes near to the *Nature* of *Contracts*; for as he who *sells* a thing, tho' he mention nothing particularly, is yet presumed to stand obliged to perform the *Conditions* that naturally belong to such a *Sale*: So he that *transgresseth* a *Law*, seems voluntarily to lay himself

(*d*) That comes near to the *Nature* of *Contracts*.] *Servius* often makes this Remark upon the 4th *Æneid*, For those who exceed the *Measure* of the *Offence*, do render themselves deserving of *Punishment*. And again, To condemn is to discharge a *Man* from his *Debt*; hence the Expression of, *Damnabis tu quoque votis*. And upon the 10th *Æneid*, *luant peccata*, *luant*, that is, *absolvant*, let 'em pay off their *Crimes*. And we say too, *luo pœnam*, but *Peccatum* is much better here. For an *Offence* is discharged or paid off by its *Punishment*. For whoever stands obliged by his *Crime*, is by his undergoing the *Penalty* freed from the former *Obligation*. On the other hand *luo pœnam* is not to be understood as if the *Penalty* was already paid. But however, *Custom* and *Authority* have a liberty to confound these things, just as 'tis usual to put what precedes for what follows, or what follows for what precedes. And this is what you frequently meet with in the *Language* of the *Sacred Writings*. For as *Tertullian* de *Oratione* says, A *Debt* in the *Scriptures* is the *Figure* of a *Transgression*, because the *Person* *Transgressing* is thereby indebted to *Justice*, and *Justice* demands a *Satisfaction* of him. *St. Chrysostom* in his *Oration* de *terra motu*, in *Tom. 5*. talking of that rich *Man* who is oppos'd to *Lazarus*, and explaining the Word ἀπέλαβες received, a Word us'd in that *Passage* of the *Gospel*, has the following *Observation*, ἐχρεώσαντο αὐτῷ τιμωρίας, ἐχρεώσαντο αὐτῷ ὀδύνας, *Punishments* were owing him, *Pains* were owing him. And in his 2d de *penitentia*, τὰ ἀμαρτήματα εἰς ὀφειλήματα ἀναγέγραπται, *Sins* are accounted *Debts*. *St. Austin* 3. de *libero Arbitrio*: And therefore if he does not satisfy *Justice* in his *Actions*, he must satisfy *Misery* in his *Sufferings*: because in both these there sounds something of the Word *Debt*. For it might also be express'd thus: If he does not by his *Actions* pay what he owes, he shall by his *Sufferings* pay for't.

self under the *Penalty* of that Law, there being no great *Crime* that is not *punishable*; so that he who *willingly* transgresses a Law, is by Consequence *willing* to undergo the Punishment; in which sense some Princes have pronounced Sentence upon a Malefactor thus, (e) *Thou hast brought this Punishment upon thy own Head*; and they that take wicked Counsel, are then said to be *punished* for their Demerit, *i. e.* to lay themselves under an Obligation of being punished by their own Will: And the Woman in *Tacitus*, who married another Man's *Slave*, is said to have consented to her own *Slavery*, that being the *Punishment* ordained against such.

4. *Michael Ephesus* upon the 5th of *Aristotle's Nicomachia*, tells us, γέγονε τρέπον τινα &c. There is herein a kind of giving and receiving, after the nature of *Contracts*; for he who has stole either the Goods or any thing else of another Man's, is punished for it. And a little after, συναλλάγματα δὲ &c. Under the Name of *Contracts* the Ancients comprehended, not only such as were made by mutual Agreement, but those Actions also that were forbidden by the Laws.

III. That to punish does not naturally belong to any one Person, but that Punishment may be lawfully required according to the Law of Nature, by any body who is not guilty of the like Crime.

III. 1. But the Subject of this Right, that is, the Person to whom the Right of punishing belongs, is not determined by the Law of Nature. For natural Reason informs us, that a Malefactor may be punished, but not who ought to punish him. It suggests indeed so much, that it is the fittest to be done by a Superior, but yet does not shew that to be absolutely necessary, unless by
Supe-

(e) *Thou hast brought this Punishment upon thy own Head*] Philo at the end of his first Book *de vita Mosi*, αὐτοὶ γὰρ τοὶ ἀπειθήσαντες ἀμαρτανεύειν, αἰνῶσθε καὶ περὶ τιμωρίας, For while you make haste to Sin, you are hurrying to Punishment.

Superior we mean him who is *innocent*, and detrude the guilty *below* the Rank of *Men*, and place them (ee) among the *Beasts* that are subject to Men, which is the Doctrine of some Divines. *Democritus* ascribes it to *Nature*, that the better should govern the worse. And *Aristotle* says, That both in *Nature* and *Art* meaner things are made for the use of nobler.

2. The Consequence of which is, that a Man ought not to be punished by one who is equally guilty with himself; according to that of our Saviour to the *Pharisees*, *Joh. viii. 7. Let him amongst you that is without sin, (viz. such a kind of Sin) cast the first Stone at her.* Which he therefore spoke, because at that time the Manners of the *Jews* were extremely corrupted, in so much as they, who pretended to be the greatest *Saints*, would wallow in *Adulteries*, and other such abominable Sins, as appears by *Rom. ii. 22. Wherefore thou art inexcusable, O Man, whoever thou art that judgest; for in that thou judgest another, thou condemnest thy self, seeing thou that judgest dost the same things.* Therefore what *Christ* had said before, the *Apostle* saith here. To the same purpose is that of *Seneca*, *That Sentence can have no Authority, where he that condemneth another, may as justly be condemned himself.* And in another place, *A Survey of our own Actions will make us more moderate in passing Judgment upon others, if we consult our own Breasts, and consider (f) whether we have not been guilty of the like Crimes. Let every one, saith St. Ambrose, that is about to judge another, first judge*

Apol.
David.

(ee) Among the Beasts.] So *Moses Maimonides* upon *Deut. xxxiii.*

(f) Whether we have not been guilty of the like Crime.] Agreeable to this is a Passage of *St. Ambrose* in his 20th Sermon upon the Psalm, *Beati immaculati* at the Verse *Miserationes tua Domine*, a Passage cited *Caus. 3. Quæst. 7.* So that of *Cassiodore* 6, 21.

judge himself, and not condemn the Errors and Oversight of other Men, while he is guilty of far greater himself.

IV. That among Men Punishment is not to be required, but for the sake of some Benefit that may accrue thereby, but that it is otherwise with God; and why.

Thucyd.

IV. 1. Another Question arises concerning the End proposed in punishing. For what we have hitherto said amounts only to this, that the guilty Person hath no Injury done him, in case he be punished. But it doth not follow from hence, that he must necessarily be punished. Nor is it true; for both God and Men do pardon many Offenders many Offences, and are deservedly praised for it. For as Plato first, and after him Seneca well observed, *No wise Man punishes an Offender, because he hath offended, but that he may not offend again.* For what is once done cannot be recalled, but what is to come may be prevented. Therefore all Punishments have regard to the future, and he that punisheth should not be angry, but provident. Diodorus in his Speech to the Athenians concerning the Mityleneans, saith, *That they had done very unjustly, but yet that they were not to be destroyed, unless it should be judged expedient.*

Gorg.

2. These things indeed are true of Punishments amongst Men: Because one Man is so linked in Bonds of Consanguinity to another, (g) that he ought never to do him Harm, but for the sake of some Good; but it is otherwise with God, to whom Plato falsely extends the aforesaid Maxims. For his Actions may be grounded on the sole Right of his Sovereign Dominion and Jurisdiction over us, especially in extraordinary cases, tho' they propose no end to themselves beyond themselves: And thus do some of the Hebrews explain that of Solomon, which

(g) That he ought never to do him Harm but for the sake of some Good. Cassiodore de amicitia, *If by Accident one Hand hurts the other, that which is hurt does not strike again, nor endeavour to revenge it.*

which is pertinent enough to the present purpose, *The Lord hath made all things for himself, even the wicked for the Day of Wrath; i. e.* even then, when he *punisheth* the wicked, he does it for no other *End*, but only to *punish* them. And although we do admit of the more common Acceptation, yet it will return to the same thing, *viz.* that God may be said to have made all things for *himself*, *i. e.* by the Right of that transcendent *Liberty* and *Perfection*, which is inherent in him, without seeking or regarding any thing without him; as God is called *αυτοφύς*, a *Being of himself*, because not born or created of any. The Holy Scriptures do testify, that God certainly inflicts *Punishment* sometimes upon profligate abandoned Sinners, for no other Reason but to *punish* them. As when he is said to *rejoice at their Calamity*, and to *mock when their fear cometh*. Besides too, the *last Judgment*, after which there is no Place or Hopes of *Amendment*; nay, and some Punishments which in this Life are *imperceptible*, that is, do not appear to the Eyes of Men, but are only felt by the Mind of the *Sufferer*, such as *Obduration*, do clearly evince the Truth of what we assert against *Plato*.

3. But when one Man punisheth another, *equal* to him in Nature, he ought to propose some End to himself. And this is what the *School-Men* mean, when they say, that the Design of an *Avenger* in punishing, ought not to terminate in the Sufferings of the Criminal. But before them *Plato* declared, that those who punish any Man with *Death*, or *Banishment*, or a *Fine*, do not do it purely for the sake of Punishment, but of some good, Μὴ βέλους ἀπλῶς, ἀλλ' εὖναι τὴ ἀγαθῇ. And (b) *Seneca*, that Men ought

(b) Seneca.] And in his 2d B. de ira, Ch. 12. I will prosecute him, not because I am aggrieved, but because 'tis what I ought to do.

to affect Revenge, not as it is sweet, but as it is profitable. So likewise Aristotle, some things are simply good, others through Necessity. And an instance of the latter he gives in exacting Punishments.

V. In what
Sense Re-
venge is
naturally
lawful.

V. 1. What therefore was said by the Comic Writer,

Th' Offender's Pain is to th' Offended Ease:

And by Cicero, *That Pain is mitigated by Punishment*: And by Plutarch, *That Satisfaction is a kind of Medicine to a sick and inflamed Mind*; is agreeable indeed to that part of our Nature, (i) which we have in common with Beasts; for Anger, as well in Men, as in Beasts, is (k) *an heat of Blood about the Heart, raised by a Desire of Revenge*, as Eustathius rightly defines it; which Desire or Appetite is so void of all Reason in it self, that it often mistakes its Object, and is hurried on with Violence even against those that have done us no harm, as when we revenge our selves upon the *Whelps* of the Creature that hurt us, (l) and some-
times

(i) Which we have in common with Beasts.] Hence that of Homer, $\chi\acute{o}\lambda\omicron\ \&\ \mu\iota\upsilon\ \alpha\gamma\epsilon\iota\ \eta\pi\epsilon\tau$, But him bad Savage Anger seized. And again;

$\alpha\gamma\epsilon\iota\omicron\ \epsilon\iota\ \sigma\acute{\eta}\theta\epsilon\alpha\iota\ \&c.$

His haughty Breast with Brutish Passion rag'd.

And again,

$\alpha\lambda\lambda'\ \alpha\chi\iota\lambda\lambda\epsilon\upsilon\ \delta\alpha\mu\alpha\sigma\omicron\nu\ \delta\upsilon\mu\acute{\omicron}\nu\ \mu\acute{\epsilon}\gamma\alpha\nu.$

But tame, Achilles, that great Spirit of Yours.

(k) *An Heat.*] Hence in Homer $\sigma\beta\acute{\epsilon}\alpha\tau\alpha\iota\ \chi\acute{o}\lambda\omicron\nu$, to extinguish Wrath.

(l) *And sometimes against things altogether without Sense.*] Seneca de ira, l. 2. c. 26. How foolish is it to be Angry with what has neither
deserv'd,

times against Things altogether *without Sense*, just as when a *Dog* bites the *Stone* that's thrown at it. (m) But this Appetite considered in its self does not belong to the *Rational Soul* whose Office it is to govern the Affections, and consequently not to the *Law of Nature*, because That only is the *Dictate of Nature*, which proceeds from our *Rational* and *Social Nature* considered as such. But our *Reason* tells us, that we ought not to do another Man any Damage, unless it be for some good that may accrue thereby. But in the *Pain* or *Sufferings* of our Enemy, barely considered in themselves, there can be nothing of *Good*, but what is *false* and *imaginary*; as in superfluous Riches, and many other things of the like Nature.

2. And in this Sense *Revenge* is condemned, not only by *Christian Teachers*, (n) but by *Philosophers* too. Thus *Seneca*, *Revenge is barbarous and inhuman, and tho' it commonly be accounted lawful, yet it differs nothing from an Injury, but in Order of Time only. He that retaliates his Grievance upon another, only offends with a better Excuse.* Nay, if we will give Credit to *Maximus Tyrius*, he is more guilty that revenges himself, than he that first did the Injury. And *Mufonius*, *To meditate how we may bite him that has bit us, and injure him that has injured us, is the part of a Beast, and not of a Man.* *Dion* in *Plutarch*, who turned *Plato's* Philosophy into Maxims for the Conduct of Life, saith,

Lib. de Ira,
2. 32.

deserv'd, nor feels our Passion. The *Brasilians*, a wild Savage People, revenge themselves upon the *Sword*, as upon the *Man*.

(m) But this Appetite consider'd in it self does not belong to the *Rational Soul*, whose Office it is to govern the Affections.] See what *Seneca* has upon this Subject, l. 1. c. 5. de ira.

(n) But by *Philosophers* too.] *Plato* *Gorgia*. See what *Theodores* says about him, l. 20. *Curatior*.

saith, *That Revenge is indeed looked upon to be more just than an Injury in the Eye of the Law, but in the Eye of Right Reason they both proceed from the same Disease or Weakness of Mind.*

3. It is therefore contrary to the Nature of one Man's acting against another, to be pleas'd and satisfied with the *Pain* or *Trouble* he brings upon him, barely as it is *Pain* or *Trouble*. And therefore the weaker any one's *Reason* is, the more prone he will be to *Revenge*. *Juvenal,*

But oh Revenge than Life is sweeter far!

(o) *Thus think the Crowd, who, eager to engage,
Take quickly Fire, and kindle into Rage;
Who ne'er consider, but, without a Pause,
Make up in Passion what they want in Cause.
Not so mild Thales, nor Chrysippus thought,
Nor that good Man who drank the poy's'nous Draught
With Mind Serene; and could not wish to see
His vile Accuser drink as deep as he:
Exalted Socrates! Divinely Brave!
Injur'd he fell, and dying he forgave,
Too noble for Revenge; which still we find
The Pleasure of a weak and little Mind;
Degenerous Passion, and for Man too base,
(p) It seats its Empire in the Female Race.* Creech.

The same Observation is made by *Lactantius*: *Foolish and unexperienced Men,* saith he, *if they have* any

(o) *Thus think the Crowd.*] *Seneca de ira*, l. 13. *But Children, old People, and Folks Indisposed, are always very fretful; and indeed every thing that's weak, and out of Order, is naturally given to Complaints.*

(p) *It seats its Empire in the Female Race.*] *Terence in his He-cyra, How do Children bite and scratch for the smallest Trifles! And why? Marry, because their Understandings are weak, and not able to direct*

any Injury offered them, are hurried on with a blind and inconsiderate Fury, to revenge themselves upon those that hurt them.

4. 'Tis evident therefore that one Man cannot justly be punished by another, for *Punishment's* sake. Let us then enquire what those *Benefits* of punishing are, that can make it lawful.

VI. 1. To this end the *Division* of *Punishments* made by *Plato* in his *Gorgia*, may be of some use to us, which the Philosopher *Taurus* has followed, as he is quoted by *Gellius*, l. 5. c. 14. For that *Division* is taken from the *End* of punishing; and whereas *Plato* had proposed but two *Ends*, *Reformation* and *Example*; *Taurus* adds a third, (q) τιμωρίαν, which (as *Clemens Alexandrinus* defines it) is the *Retribution* of an *Evil* done, in order to make *Satisfaction* to the *Sufferer*. *Aristotle* omitting that part of the *Division*, which proposes *Example*, as one *End* of punishing, only adds this of *Satisfaction* to that of *Reformation*, which he says is instituted for the sake of the *Person* demanding it. Nor has *Plutarch* omitted it, when he saith, *Those Punishments* which immediately follow *Transgressions*, do not only restrain the *Audaciousness* of *Offenders*, but are the greatest *Consolation* of the *Offended*. And this is what the same *Aristotle* has placed under that part of *Justice* which he calls *Commutative*.

VI. The Benefit of Punishment threefold.

Rhet. 6. c. 10.

VOL. II.

G g

2. But

direct 'em; [and your Women truly are e'en as soon moved as Children. *Ammianus Marcellinus*, l. 26. speaks of Anger thus, The Wise define it the lasting Ulcer of the Mind, and sometimes a Perpetual one, that usually arises from a Softness in the Judgment, which they conclude with a great deal of Probability from hence, because the weak and the declining are more peevish than the sound and strong, Women than Men, Ancient People than young ones, and the unfortunate than the happy.

(q) Τιμωρίαν.] *St. Chrysostom* too upon 1 Cor. xi. 32. lays down these Three *ὑποδείξις*, *τιμωρίαν*, *κολάσιν*, *Reformation*, *Satisfaction*, *Example*.

2. But to examine this Point more accurately. I say then, that Punishment may have Regard either to the Good of the Offender, or of *him* who suffers by the Offence, or of any Persons indiscriminately.

VII. Punishment is for the Benefit of the Offender; and that any one has by the Law of Nature a Right to inflict it; but this with a Distinction.

VII. 1. The first of these three Ends of punishing, is by the Philosophers called sometimes *Reformation*, sometimes *Satisfaction*, and sometimes *Admonition*; by Paulus the Lawyer, *The Punishment, that is ordained for Amendment*; by Plato, *The Pain that teaches us Prudence*; by Plutarch, *The Medicine of the Mind*, whereby she is amended and made better after the Manner of *Physick*, which works by *Contraries*. For since all *Human Acts*, if they be deliberate and often repeated, do beget a *Proneness* in *Nature* to the same, which at length turns to an *Habit*; all *Allurements to Vice* are to be cut off, as soon as possible, which cannot be done more effectually, than by allaying the *Sweetness* of the Sin, (r) with the *Sharpness* of the ensuing Punishment. The *Platonists* hold, as *Apuleius* testifies, *That Impunity and Want of Reproof* are more severe and pernicious to an Offender, than any Punishment whatsoever. And *Tacitus*, *That a corrupt Mind is not to be regulated with gentle Methods, when inflam'd by inordinate Appetites*.

2. That it is lawful for any one, who is judicious and prudent, and not guilty of the same or of a like Fault himself, to inflict that Punishment, which

(r) *With the Sharpness of the ensuing Punishment.*] Seneca de ira, v. As we put the Steels of our Spears that are crooked into the Fire, and burn 'em to make 'em Straight, and beat and hammer 'em, not to break 'em, but to smooth and make 'em even; so we correct great Vices by the Pain of Body and Mind. And in l. ii. c. 27. Among these will come in good Magistrates, Parents and Judges, whose Correction must be submitted to, as the Surgeon's Lancett, and the Physician's low Diet, and other Expedients which are troublesome for the Present but are very much for our future Advantage.

is subservient to this End, is plain from that *verbal* Correction which every Body is indulg'd.

To chide a Friend in fault is an Unthankful Office, but what is sometimes Useful. Plaut.

But if the *Punishment* be by *Stripes*, or have any Thing of *Violence* and *Compulsion* in it, (*s*) *Nature* does not distinguish, to whom it is *lawful*, and to whom it is *not*, nor indeed could it make this Distinction (unless it be, that our *Reason* gives this Right peculiarly to *Parents* over their *Children*, because they are under a Necessity of being well affected towards them;) but what *Nature* could not do, the *Laws* have done, which have restrained that *common* Neighbourhood and *general* kindred of Mankind (to avoid Disputes and Controversies) to our *nearest Relations* only, as appears both from the Codes of *Justinian*, under the Title, *De Emendatione propinquorum*, and elsewhere; apposite whereunto is that of *Xenophon* to his Soldiers, εἰ μὴ ἐπ' ἀγαθῶ &c. *If I beat any Man for his Good, I deserve Punishment, but no other than what is due to Parents from Children, and Masters from Scholars.* For even *Physicians* do sometimes lance, scarifie and cauterize their *Patients*, when they cannot cure them by gentler Means. And *Lactantius*, B. vi. God commands us to keep a strict Hand over our Children, that is, to chastise them, as often as they transgress, lest by too much Fondness and Indulgence, they become froward and headstrong, and contract vicious Habits.

3. But this kind of Punishment ought never to be *Capital*, because *Death* is not a Good, unless

G g 2 it

(s) *Nature* does not distinguish, to whom it is *lawful*.] See St. Augustine enchirid. cap. 27.

Mar. xiv.
21.

De Irá. c.
16.

it be it so indirectly and by way of *Reduction*, as *Negative Terms* are reduced to their opposite *Positives*. For as Christ said, *that it had been better for some, that is, it had been less evil for them, that they had never been born*; so it may be said of incorrigible Sinners, that it is better for them, that is, it is *less evil* for them to *die* than to *live*, when it is certain they would still grow worse, if their Life was prolonged. *Seneca* means such as these, when he says, *That it is sometimes for the Advantage of them that die, to die*. And *Jamblicus*; *As it is better for a suppurated Tumour to be cauterized, than to let it swell on*; so is it for a Man, who is desperately wicked, to die than to live. Such an one *Plutarch* calls a great Plague to others, but the greatest of all to himself. And *Galen*, after he had said, that Men may be punished with *Death*, first to prevent the Mischief they would do, were they suffered to live, Secondly, that their Punishment may be a Terror to others, adds in the third Place, *that it is expedient, even for themselves to die, being so wholly corrupted in Mind and Manners, that it is impossible to reclaim them*.

4. Some there are, who think, that St. John spake of such Men, when he said, (t) *There is a Sin unto Death*. But because no Arguments can be brought to prove this, but what are fallacious, *Charity* teaches us not to judge any one rashly to be a *Reprobate*; and therefore a Punishment with this

(t) *There's a Sin unto Death*.] St. Chrysostom upon 2 Cor. xiii. 9: calls those who are guilty of this, τὰς ἀνίατα νοσήνας, incurably sick. And Julian in his second Book of Constantius: δὲ τῶν ὀντων &c. There being two sorts of Offenders, some who are corrigible and give Hopes of Amendment, others who are Irrecoverably wicked, for the later the Laws have thought fit to make Death the Conclusion of their Evils, not so much for their own Benefit as that of others.

this *End* and *View* ought very rarely to be made use of.

VIII. 1. (u) The *Benefit*, that arises from Punishment to him, against whom the *Offence* was committed, consists in this, that it prevents for the Future the like *Offence* against him, either by the same Person or by others. *Gellius* out of *Tau- rus* describes this kind of Punishment thus, *When the Dignity or Authority of the Person, against whom the Offence is committed, is to be supported and maintained, lest, if it go unpunished, his Authority be despised and his Honour impaired.* Now what is there said concerning the *Loss of Authority*, will equally hold good of the *Loss of Liberty*, or of any other *Right*. We read in *Tacitus*, *He should consult his Safety by a lawful Revenge.* Now there are three ways of securing a Man's self from him who injured him; first by putting him to *Death*; secondly, by putting it out of his *Power* to do him any further Injury; and lastly by the *Severity* of his Punishment, to deter him from offending any more, which has a mixture of that *Reformation* in it we were just now treating of. To prevent the injured Persons being injured by others, all kinds of Punishments are not to be inflicted, but only such as are open and publick, which appertains to that *End* of Punishment, that is for *Example*.

2. If therefore our *Revenge* be directed to these Ends, and confined within the Bounds of *Equity*, if we regard the bare *Law of Nature*, that is, abstracted from *Divine* and *Human* Laws and those *Circumstances* that are not *Essential* to the *Affair*, though it be *private*, yet is it not *unlawful*; whether

G g 3

VIII. For the Benefit also of the Person offended; where of Revenge allowable by the Law of Nations.

(u) The *Benefit* that arises from Punishment to him against whom the *Offence* was committed.] There is some Resemblance of this to be found even among the Beasts. The Lion avenges himself of his Adulteress, *Pliny's Natur. Hist.* viii. 16,

ther it be taken by the injured Person himself or some other, since it is natural for one Man to succour another. And in this Sense may be admitted that of Cicero, where after he had shewed that the Law of Nature does not consist in unsettled Opinions, but in the innate Sentiments of the Mind, among the Instances he gives of its Dictates he places Revenge, which he opposes to Pardon; and, lest any one should doubt what he meant by Revenge, he defines it to be *That, whereby we repel Force and Injuries either defensively or offensively both from our selves and those who ought to be dear to us, and That whereby we punish Offences.* And Mithridates, in an Harangue which Justin has transcribed from Trogus, speaks thus, *Against a Robber all Men ought to draw their Swords, if not for their Safety, yet for their Revenge.* And Plutarch in his Life of Aratus calls this very thing αἰῶνις νόμον, the Law of Revenge.

Sampson, making his Defence against the Philistine, does (z) by this Natural Right declare his Innocence, if he injured them who had first injured him: And after he had revenged himself of them, he justifies himself with the same Reason, saying, *As they have done to me, so have I done to them.* Thus the Platæans in Thucydides ὁρθῶς ἐτιμωροῦσάμεθα &c. *We have deservedly punished them, for by a Law that Universally prevails, we may without any Crime be revenged on an Enemy, who first assaults us.* And Demosthenes in his Oration against Aristocrates urges, *That the Law common to all Men suffers us to Revenge our selves upon him, who takes away any thing from*

(z) By this Natural Right] Romulus in Plutarch speaking of Tarcinius, murder'd by the Laurentes, says. φόνον φόνῳ λελύσθαι, that Blood must be expiated with Blood. And the same Plutarch of the Mantinenses ill-us'd by the Achæans; καὶ ταῦτα μὲν ἔχει τὸν αἰῶνις νόμον, such Treatment was entitl'd to a Revenge. Belisarius in Procopius Vandal. 1. φύσει γὰρ &c. For the injur'd Party is by Nature in a State of Enmity with those who offer the Violence.

from us by Force. And Jugurtha in *Salust*, after he had endeavoured to shew that *Atherbal* lay in wait for his Life, adds, *That the Romans would not do him common Justice and Equity, if they should hinder him to put the Law of Nations in Execution, that is, to take his Revenge.* And *Aristides* the Orator proves it from *Poets*, from *Lawyers*, from *Proverbs*, from *Orators*, and all other Authorities, to be lawful to take Revenge on those, who have first attempted to do us an Injury. (y) *St. Ambrose* commends the *Maccabees* (z) for revenging the Death of their innocent Brethren even on the Sabbath-Day; and disputing with the *Jews*, who heavily complained of the *Christians* for burning one of their Synagogues, he pleads thus: *If I should argue, saith he, according to the Law of Nations, I should recount how many Christian Churches the Jews burned in the Reign of Julian the Emperor, where (a) he calls Retaliation the Law of Nations. Agreeable to which is that of Civilis in Tacitus, I have been purely rewarded for my Pains, my Brother's Death, my own Imprisonment, and the most reproachful Language his Army could give, who required to have me delivered up to Punishment, and therefore by the Law of Nations I demand Satisfaction of 'em.*

4. But because we are apt to be *Partial* in our own Cases, and to be hurried on too far by *Passion*, therefore as soon as many *Families* came and lived together in the same Place, that *Liberty* which *Nature* indulged them in of vindicating e-

G g 4

very

(y) *St. Ambrose*.] See too his Oration against *Symmachus*.

(z) *For revenging the Death of their Innocent Brethren*.] See *Josephus* Antiq. Hist. xiii. 1. where he vindicates the Death of *Jelm*.

(a) *He calls Retaliation the Law of Nations*.] So *Livy* too in his first Book. *When what the Laureates did was by the Law of Nations.*

every Man his own Quarrel, was then taken away,
and Judges appointed to determine all Controversies
between Man and Man.

*For when each angry Man aveng'd his Cause,
Judge to himself, and unrestrain'd by Laws;
The World grew weary of that brutal Strife,
Where Force the Limits gave to each precarious Life.*
Lucret.

Thus Demosthenes against Conon; *περὶ νόμων* &c. It has been ordained by the Wisdom
of our Ancestors, saith he, that all these Injuries
should be redressed by Law, and not by every private
Man's

(b) That all these Injuries should be redressed by Law, and not by every Private Man's Passion and Caprice.] Thus Tyndareus in Euripides's Orestes, argues against Orestes:

*Πρὸς τὸν δ' ἀγὼν τις ἦκε τῆς σοφίας πρῶτος;
Εἰ τὰ καλὰ πᾶσι φάνερα &c.*

*Are we come here to dispute his Wisdom?
If Right and Wrong to all Mankind are known,
What Greater Fool than he, who ne'er consider'd
The Justice of the Action once, nor what
The Constitutions of Greece allow'd?
For, when Agamemnon his Life had lost
By my Unhappy Daughter's Hands (a Black
And Barb'rous Deed, and what I can't approve)
He ought to've indited her of Murder,
And so her Legally have ejected
His Father's House, and then had all the World
Pity'd his Affliction, his Prudence prais'd,
He kept the Laws, and still been Pious thought.
But now into the same Misfortune he,
As his Mother was, is plung'd. He justly
Look'd on her as wicked; by killing her
Himself is yet more wicked far become.
Prius, Menelaus, let me ask thee
This serious Question:*

Should

Man's Passion and Caprice. So Quintilian, *Private Revenge is not only unlawful, but an Enemy to Peace;* for there are *Laws, Judges and Courts* whereunto we may appeal, unless there be any who are ashamed to vindicate themselves by Law. So likewise the Emperors *Honorius and Theodosius,* For this Cause are *Tribunals erected,* and the *Security of publick Laws* provided, lest any Man should give himself the *Liberty to Revenge his own Quarrel.* And King *Theodorick:* Hence sprung the sacred Reverence of *Laws,* that no Man might revenge himself by his own Hand, nor commit any *Outrage upon his Enemy* by the sudden Impulse of an impetuous *Passion.*

5. Yet the ancient *Liberty,* which the *Law of Nature* at first gave us, remains still in Force where there are no *Courts of Justice,* as upon the *Sea.* Hereunto may perhaps be referred that *Action of Caius Cæsar,* yet a *private Man,* when he pursued with a *Fleet,* equipped all on a sudden, those *Pyrates* by whom he had been taken *Prisoner,*

Vell. Pat.

" Should a Wife her Husband stab, his Son stab her,

" Him his Child stab, and so succeeding Blood

" Be made to expiate foregoing Guilt;

" Where would these Horrid Ills e'er have an End?

Which last Expressions full of Prudence have afforded, both to Philosophers and Orators, a large Field of Discourse. *Maximus Tyrius* in his Dissertation, *whether an Injury ought to be return'd,* delivers his Opinion thus: *εἰ γὰρ ἀδίκου τοῦ ἀνέμου* &c. If the injur'd Person may take his Revenge, the Evil will eternally pass from one to another, and one Injustice only shifts and succeeds another: For if you grant him who has suffer'd the Injury the Liberty of persecuting him who did it, then will it follow, that he who is thus persecuted, has also the Liberty of retaliating. For the Equity is the same on both sides. Good God! what hast thou done, what sort of Justice is this that must necessarily flow from Injustice? And how far will this Evil run, or where will it stop? And *Aristides* in a Speech of his about Peace: *τίς γὰρ Ἕλληναν* &c. Where will you have a Greek left, if on the Account of those who are Dead and gone before, those who come after were always to undergo the same Fate? The same *Aristides* has something to the like purpose in his second *Leuætrica.*

ner, dispersing some of their Ships and sinking others, and when he found the *Proconsul* negligent in punishing the Captives, he returned to Sea and *hanged* them himself. The same will take Place in *Desarts*, or where Men live after the manner of the *Nomades*; (c) so amongst the *Umbrians*, according to *Nicolaus Damascenus*, every one is his own *Avenger*; which is done with Impunity in *Muscovy* at this very Day, some Time after they have appealed to the Judge. Hence came the Custom of *Duelling*, or Fighting by single Combat, (d) amongst the *Germans* before the *Christian* Religion was planted in that Nation, which in some Places is not yet thoroughly rooted out. Wherefore the *Germans*, in *Velleius Paterculus*, were struck with Admiration, when they beheld the manner of the *Roman* Jurisdiction, finding that they could redress Injuries by *Justice*, and determine Controversies by *Law*, which us'd to be decided by Force of Arms.

6. The *Jewish* Law permitted the *Kinsman* of him, who was murdered, to kill the *Murderer* with his own Hand, if he could catch him out of the Places of Refuge; and the *Rabbis* do well remark, that a *Kinsman* might execute the Law

(c) *So amongst the Umbrians.*] Does he mean the *Ombrians* in Italy? That this was a Custom among several of the *Africans*, is testify'd by *Leo Afer*, l. ii. c. de *Tesechis*, and c. de *Teijenia*, and in other Passages.

(d) *Among the Germans.*] King *Theuderick* in *Cassiodore* iii. 23. reproving his *Goths*, addresses himself to 'em thus: Break off this old abominable Custom: Pray let your Matters be disputed with Words and not with Swords. And in the 24th. What makes you run to Duelling? What occasion has a Man for a Tongue, if his Arms are to plead his Cause? At *Trachonitis* in the East, *ῥῆμα ὡς ἄντα τῶτον ἐπεξεύει τὰς οὐρανὸν πορεύς*. 'Tis an establish'd Rule to pursue by any Method a Revenge upon the Murderers of ones Family or Relations.

of *Retaliation* with his own Hand for the Person killed; but for himself; if any Violence was offered him; either by Wounds, Mutilation or otherwise, he was to appeal to the Judge; because it is more difficult to moderate our Revenge when it is excited by our own personal Pain. The like Custom of private Revenge for Murder, prevailed amongst the most ancient Greeks, as appears from the Words of *Theoclymenus* in *Homer*, *Odyss.* xv. But Instances of this Custom are the most frequent in those Places, where they have no publick Judges to decide their Quarrels. Hence just Wars, as *St. Austin* testifies, are usually defined to be those, whereby Injuries are revenged. And *Plato* approves of carrying on a warlike Contest so long, Till the Offender shall be compelled to make the innocent Person, who has suffered by him, just Satisfaction.

IX. 1. The Good of the Publick, or of all Persons indiscriminately, which was the third End of Punishment, is founded upon the same Reasons with the Advantage propos'd to the Injured Party. For this is done, either that he who injured one, may not injure another, which is to be prevented by putting him to Death, or by disabling him, or by imprisoning him, or by correcting and reclaiming him, or else (e) that others may not be encouraged, by the Hopes of Impunity, to be alike Injurious; and this is best prevented by publick Punishments, which the Greeks call *παρδείματα*, the Latins, *Exempla*, Examples: which are made, That the Punishment of one may strike a Terror into many

IX. And for the Benefit of all Persons.

(e) That others may not be encouraged, by the Hopes of Impunity, to be alike Injurious.] Polybius saw some Lions crucify'd for their Ravenous Desire of devouring Men, that so the Rest through Fear of the like Punishment might be deterr'd from the like Barbarity. *Pliny* l. viii. c. 16.

many, as the Laws express it, or, as *Demosthenes*,
That others may consider and be afraid.

2. And this is a *Right* that by the *Law of Nature* every one is impower'd with. (f) Thus *Plutarch*, *Nature*, says he, *bath designed the good Man to be a Magistrate, and indeed a perpetual one; for, by the Law of Nature it self, he who acts justly has a Superiority and Preheminence above others.* So *Cicero* proves by the Example of *Nasica*, that a wise Man is never a private Man: and *Horace* calls *Lollius*, not a one Years Consul; and *Euripides* in his *Iphigenia at Aulis* says:

He

(f) Thus *Plutarch*.] The same Author in his *Pelopid.* ο ποτ' &c. For it was, as indeed it's fit it should be, the Original and most ancient Custom and what Nature designs, that he who is capable of giving Assistance should be the Ruler of him who wants it. And in his *Philopoemenes*: τὸς αὐτὸς πολίτας &c. Taking upon him the Government of his Citizens, who ne'er waited for the Formality of Law and Election, but by Nature's Direction were his Subjects in Conformity to an Universal Maxim of hers, that the better Man should Rule. You have some other Passages like these at the End of the Life of *T. Flaminius*. The Author of the Causes of the Corruption of Eloquence talking of Orators, says; Nor were these some private little Fellows without Power, since both Senate and People were Conformable to their Advice and Authority. *St. Chrysostom*, 2 *Cor.* viii. 13. speaking of *Moses*: καὶ πρὸ τῆς χειραγωγίας &c. Even before he led 'em, he was by his Actions their General. It was therefore very foolishly demanded by the Hebrew, who made thee a Ruler and a Judge over us? What dost thou say? Thou seest his Deeds, and dost thou raise a Controversie about a Title? As if a Person who saw a Surgeon apply his Instrument with admirable Skill and Dexterity, saw him make a very considerable Cure, should impertinently ask him, Who made you a Surgeon, or commission'd you to perform such an Operation? Why, it was my Art and your Distemper. Good Sir! Thus was it *Moses's* Knowledge and Capacity that made him what he was. For Government is not only a Piece of Honour, but an Art, nay, and the sublimest Art. The same Writer is upon this very Subject at the End of the third Chapter to the *Ephesians*: ἡ ἀδίκητα, ἡ σὺν ὠμότης, φήσιν, αὕτη μὲ κατέστησεν ἀρχοντα καὶ δικαστήν. your Injustice, your Barbarity, says he, made me your Ruler and your Judge.

— He, whose Mind
Excels in Prudence, is a Magistrate.

Not that this *Right* or *Privilege* is to be extended any farther, than the *Laws* of the Land permit.

3. Of this Natural Right *Democritus* thus speaks; for I will quote his own Words, because they are remarkable. First concerning our Right of killing *Beasts*, this is his Opinion: *κατὰ τὸ ζῶον &c.* Concerning the killing or not killing living Creatures, the Case stands thus. If those Creatures, either do or attempt to do us hurt, whosoever kills them shall be innocent, nay, he who kills them, doth better than he who spares them. And presently after he saith, *κτείνειν χρὴ &c.* We have all Manner of Right to kill all those Creatures, that without Provocation annoy us. And indeed it is not improbable, that good Men (ff) before the Flood observed this Method of living, till God revealed to the rest of the World, that he intended the Brute Creation for their Food and Sustenance. Again, *Ὅπως περὶ κινάδων τε καὶ ἐρπετέων &c.* What we have said of Foxes and noxious Reptiles will hold good also of Men, of whom we ought to be no less aware. And then he presently after subjoins; *κτείναντα καὶ ληστὴν &c.* Every one who kills a Murderer or a Thief is innocent, whether it be with his own Hand, by his Order, or by his Verdict. Upon which Passages *Seneca* seems to have had his Eyes, when he saith, *When I command a Malefactor to be put to Death, I do it with the same Air and Mind, (g) that I kill a Serpent*

(ff) Before the Flood.] And some were afterwards observant of this Primitive Custom, as *Dicaearchus*, and others whom *St. Jerom* cites as Evidences against *Jovinian*.

(g) That I kill a Serpent or a venomous Beast.] *Καθάπερ ἔν*
ἐχέμε

pent or a venomous Beast. And elsewhere, *As we should not kill Vipers and Snakes, and other noxious Creatures; if we could tame them, like other Animals, and secure our selves and others against their Teeth and Stings; neither would we hurt and destroy Men, because they have offended, but only that they should not offend again.*

4. But since an Examination into the Nature and Circumstances of a Fact doth often require great Diligence, and the proportioning of Punishment to it much Prudence and Equity, lest while every one would presume too much upon his own Wisdom, and others not giving way to him, Quarrels should arise, it has been agreed upon in all lawful Societies of Men, to chuse out some whom they judged to be the best and most prudent, or were

ἔχεις &c. As therefore we immediately kill Vipers and Scorpions, and other Poisonous Creatures, before they either bite or wound us, or make any attempt upon us, as soon as ever we spie 'em out, by a necessary Precaution, that we may not suffer by the Malignity that's in 'em; in like manner is it fit that Men should be punish'd, who tho' they are Tame and Sociable by Nature, do yet degenerate into the Savage Cruelty of Brutes, and think it both Pleasure and Profit to do all the Mischief they can. Philo de Special. leg. 11. And Claudius Neapolitanus in Porphyry, l. 1. de non Esu Animalium, ἐκ τῆς ὀφείας &c. There's no one but will kill a Serpent if he can, lest himself, or some other Person, should unawares be bitten by him. See, if you're at leisure, what follows there. And again, not a great way farther, ὁφείναι τὸ σκορπίον &c. We kill a Serpent or a Scorpion, tho' they don't assault us, that another Body may not be hurt by 'em; and this is a piece of Revenge which we take in Justice to all Mankind. And Porphyry himself, l. 11. ὁφείναι &c. For as, tho' we are oblig'd to have Conversation and Dealings with Ill People, People who by their own Disposition and Innate Wickedness, as if they were driven on by some impetuous Wind, are for injuring any one who comes in their way, we yet think it convenient that all of 'em should be punished and taken off; so is it also proper to kill any Irrational Creature, which is naturally Injurious, and bent to hurt whatever goes near it. And this is what Pythagoras means in Ovid Metam. 15.

*Whatse'er attempts our Life, without a Crime
May it self to Death be Doom'd.*

were likely to prove so, and make them Magistrates. So the same *Democritus*, *The Laws had not restrained us from living as we pleased, if one Man had not injured another. For Envy is the Mother of Sedition.*

5. But yet, as in *Revenge* or *Punishment* inflicted for the Satisfaction of the offended Party, (whereof we have just now treated) so likewise even in this Punishment, which is for *Example*, there remain some Footsteps of the *ancient Right*, in those Places and amongst those Persons, who are not subject to any established Judicatories; and even among those too who are so subject, in some particular Cases. Thus by the Law of *Moses* (b) any private Man might upon the spot, and with his own Hands, kill a Jew who had forsaken God and his Law, or who attempted to seduce his Brother to *Idolatry*. The *Hebrews* call this (i) the *Judgment of Zeal*, which was first put in Execution by *Phineas*, and afterwards passed into a Custom. Thus *Mattathias* slew a certain Jew, who was polluting himself with the Superstitions of the *Græcian Idolatry*. Thus three hundred other Jews are said to have been killed by their own Country-men, in that Book which is commonly called the Third of the *Maccabees*. Nor was *St. Stephen* stoned upon any other Pretence, nor the Conspiracy raised against *St. Paul*. There are many more Instances of this kind to be met with (k) in *Philo* and *Josephus*.

Deut. xiii. 9.

Numb. xxv.

Macc.

Act. vii.

Act. xxii. 13.

6. More-

(b) Any private Man might upon the Spot, and with his own Hands, kill a Jew.] Add to this a Passage of *Josephus*, 12. 8. *Moses Maimonides*, ad 13. Artic. and Direction. l. 3. c. 41.

(i) The Judgment of Zeal.] See 1 Maccab. 11. 24. 26.

(k) In *Philo*.] Whose Opinion of this Matter is this in his Book *de Sacrificantiis*, καλασέον ὡς δῆμιον &c. We ought to use him as a publick and common Enemy, without any Regard to his being Related

6. Moreover in many Nations the *plenary* Right of punishing even with *Death* remained in *Masters* over their *Servants*, and *Parents* over their *Children* after the *publick* *Laws* were established. Thus in *Sparta* it was lawful for the *Ephori* to kill a Citizen without any legal Prosecution. From what has been said we may plainly see, what the *Law* of *Nature* was concerning Punishments, and how long it continued.

X. What the Gospel has injoin'd in this case.

X. 1. Let us now enquire whether this *Liberty* of punishing or revenging Injuries be not restrained by the Gospel. 'Tis no wonder indeed, as we said elsewhere, that many things which are permitted by the *Law* of *Nature* and the *Civil* *Law*, should be forbidden by the *Divine* *Law*, that being the most perfect of all *Laws*, and proposing a *Reward* greater than any thing *Human* *Nature* can offer; and to obtain such a *Reward*, 'tis no wonder if *Virtues* that exceed the bare Dictates of *Nature*, are required. (1) That those *Corrections* which leave no *Infamy* nor lasting *Damage* behind them, and in some *Ages* and *Circumstances* are necessary, especially if they be inflicted by such Persons, as *Human* *Laws* permit so to do, as by *Parents*, *Tutors*, *Masters*, and *Teachers*, are no ways repugnant to the Precepts of the Gospel, may be plainly enough gathered from the Nature of the Thing. For these *Medicines* of the *Mind* are altogether

to us, and immediately to acquaint all, who have a Respect for Religion, with his Perswasions that with the utmost Expedition they may run to the Punishment of the wicked Wretch, fully convinced that it is an Act of Piety to murder such a Fellow as this. And there's another Passage to this purpose no less remarkable, about the End of his Treatise de Monarchia.

(1) That those Corrections.] 'Tis a Sin not to restrain the Vices of our Servants and Children, Lactantius de ira Dei. c. 18. where there are several more things upon the same Subject.

gether as innocent, as the salutiferous *Potions* for the Body, tho' ungrateful to the Sense.

2. But the same is not to be said of *Revenge*. For as it only raises the *Passion* of the *Aggrieved*, it is so far from being agreeable to the Gospel, that it is not allowed of even by the *Law of Nature*, as we have shewn above. But the *Law of Moses* did not only forbid the *Jews* to entertain any Hatred against their *Neighbour*, that is, their *Country-man*, but also to shew them some sort of *Kindness*, even when they were *Enemies*. Wherefore the Name of *Neighbour* being extended to all *Mankind* by the Gospel, 'tis plain that it is required of us, not only not to *hate* our *Enemies*, but even to do *good* to them, which is expressly commanded, *Matt. v. 44.* yet it was permitted to the *Jews* to seek *Revenge* for some great Injuries, not indeed by their *own Hands*, but by appealing to the *Judge*. But the Gospel takes away this Indulgence too, as is evident by the opposition which our blessed Saviour puts between the *Law* and the Gospel. *Ye have heard, saith he, that it hath been said an Eye for an Eye, &c. But I say unto you.* For tho' what follows is properly concerning repelling of Injuries, and even this Liberty does it in some measure at least *restrain*, yet is it to be understood as much more strictly prohibiting *Revenge*; because it quite abrogates the old Indulgence (m) as only suitable to the time of a more imperfect Dispensation; not that a just *Revenge* is evil, but that *Patience* is much better; as *Clement's Constitutions* have it, B. 7. Chap. 23.

Lev xix. 17.

Exod. xxiii.

4. 5.

Clem.
Const. lib.
7. 23.

VOL. II.

H h

3. Whereof

(m) As only suitable to the Time of a more imperfect Dispensation. An Eye for an Eye, which, if we may so say, is the Justice of the Unjust. St. *Austin* in his Exposition of Ps. cviii. quoted c. *de Offensia* 23. quest. 3.

3. Whereof (n) *Tertullian* thus speaks, *Christ plainly teaches us a new kind of Patience, forbidding even that Retaliation which God before allow'd of, when he requir'd an Eye for an Eye, and a Tooth for a Tooth, commanding us to turn to him that shall smite us on the Right Cheek, the other also, and to let him that shall take away our Coat, have our Cloak too.* without doubt *Christ* added these things, as *Supplements* to the *Mosaical Dispensation*. And therefore we are to look back and consider, whether the *Doctrine* of bearing *Injuries* be deliver'd in the *Old Testament*. God there, by his *Prophet Zechariah*, commands, that no *Man* should remember the *Injury* of his *Brother*, or even of his *Neighbour*. For again he saith, Let no *Man* think of the *Evil* his *Neighbour* has done him. And certainly he who commands us to forget *Injuries*, doth much more strictly command us to bear them patiently. And when he says, *Vengeance is mine, I will repay it*, what doth he but teach us, That we should wait with *Patience*, till God (whose *Prerogative* it is to *Revenge*) will be pleas'd to take our *Cause* into his *Hand*? As far therefore as it is inconsistent, that he should

(n) *Tertullian*.] Against *Marcion* 4. And in his Book *de Patience*: *Christ* Superintending *Grace* upon the *Law*, to enlarge and complete it, gave his own *Patience* to its *Assistance*, because that alone was wanting to make up the *Doctrine* of *Righteousness*. And *St. Chrysostom* upon *Ephes. iv. 13.* *ἵνα τὰ ὀφθαλμοὶ &c.* For this Reason 'tis said, an *Eye* for an *Eye*, and a *Tooth* for a *Tooth*, to eye up *either's* *Hands*, and not to stir up *thine* against him; not only to secure thy *Eyes* from harm but to preserve his too. But what I wanted to know is this, why, since *Revenge* is allow'd, are those *blam'd* who have recourse to it? And presently after, *συγγιγώσκει ὁ θεὸς &c.* God pardons those, whom the sudden Sense of an *Injury* and *Violence* offer'd, may perhaps hurry on to require a present Satisfaction; and therefore he says, an *Eye* for an *Eye*. But elsewhere, the ways of the *Revengeful* lead to *Death*. Now if where 'tis permitted to pull one *Eye* out for another, the Punishment of the *Revengeful* be such, how much greater shall it be to those, who are expressly commanded to bear with any ill.

should require a Tooth for a Tooth, and an Eye for an Eye, by way of return for an Injury, who does not only prohibit any such Return, but even any Revenge at all, even the very Remembrance of an Injury; so far is it made plain to us, what he designed by an Eye for an Eye, and a Tooth for a Tooth, viz. not to allow the first Injury to be punished by a second of the same kind, by way of Retaliation, which he had prohibited by prohibiting Revenge, but to restrain the first Injury by way of Example, that every one perceiving the Liberty of a second Injury indulg'd, might forbear to do the first. For he well knew, that Men would more easily be restrained from Violence, by permitting the Law of Retaliation to be put immediately in Execution, than by threatening a distant Punishment. But both these Methods were necessary to answer the different Dispositions and Faith of Men, that he who believ'd in God, might be deterred by the dread of Divine Punishment; and he who believ'd not, by the Law of Retaliation.

4. The Intent of this Law, which was hard to be understood, Christ the Lord of the Sabbath, of the Law, and of all his Father's Dispensations, hath revealed and explained to us, commanding us even to turn the other Cheek, that he might the more effectually eradicate Revenge, which even the Law had designed to hinder, and which without doubt the Prophets had manifestly restrained, both by forbidding us to remember Injuries, and by commanding us to rely upon God for their Punishment. And therefore what Christ adds, doth not destroy or invalidate the Doctrine of the Old Testament, but rather strengthens and confirms it. And after all, if we examine this Doctrine of so exact and perfect a Patience thoroughly, it would not be reasonable, if it did not proceed from God who has promised to be our Avenger, and to perform the Office of a Judge. For if he who lays so great a Burden of Patience upon me, as not only not to return a Blow,

but to turn my Cheek to the Smiter; and not only not to return reproachful Language, but to bless those that curse me; and not only not to refuse my Coat, but to give my Cloak also; if he, I say, will not defend me, in vain doth he command me Patience, not giving me the Reward of the Command, the Fruit of Patience, I mean Revenge, which he ought to have permitted me to take, if he doth not do it himself; or if he permits not me to do it, he ought to do it himself; because to punish Injuries is a necessary part of good Discipline. For by the Fear of Punishment all Acts of Violence are restrained. But if every one was left to his Liberty, Violence would rage to such a Degree under the Protection of Impunity, that People would have both their Eyes and all their Teeth beat out.

5. *Tertullian* we find is of Opinion, that not only *Christians* are forbidden to require *Retaliation*, but also that the *Jews* themselves were not permitted to do it as a thing in it self lawful, but only to prevent a greater Evil; which certainly holds true of that *Exaction of Punishment*, which proceeds from a Grudge or Hatred, as appears from what we have already said. For that this was condemned by the wisest of the *Jews*, who did not only regard the Letter, but the Intention of the Law, is plain from *Philo*, in which Author the *Jews of Alexandria*, upon the Persecution of *Flaccus* their bitter Enemy, express themselves thus
ἐκ ἐφροδόμεθα, ὡς διαπολεῖα, τιμωρίας ἐχθρῷ, δεινίσταται-
μένοι πρὸς τὴν ἐξουίαν νόμων ἀνθρώπων· We take
Pleasure, O Lord, in the Punishment of our Enemy,
being taught by thy holy Laws, a Compassion and Fel-
low-feeling for all Mankind. And to this Purpose is that general Command of Christ, To forgive all

(c) Being taught by thy Holy Laws to have a Compassion and Fellow-feeling for all Mankind.] See Origen against Celsus.

who have offended us, Matt. vi. 14, 15. that is, neither to do nor wish them Evil, only because they have done us Evil: For whosoever doth so, as *Claudian* expresses it,

*Ferus est Legumque videtur
Vindictam præstare sibi.*

*Is barb'rous, and seems himself assuming
A Vengeance that to the Laws belongs.*

For which Reason *Lactantius* quoting that Saying B. VI. of *Cicero*, It is the first part of Justice not to do any Man any Harm, unless we be provoked by an Injury, makes this Reflection upon it, O what a plain and true Sentence is here spoiled by the Addition of two words! And St. *Ambrose* saith of the same Sentence of *Cicero*, That it wanteth the Authority of the Gospel to confirm it.

6. But what shall we say of Punishment, not as it regards what is past, but what is to come? surely *Christ* would have us to forgive even this; first, if he who has offended shew any Tokens of Repentance, *Luke* xvii. 3. *Eph.* iv. 32. *Col.* iii. 13. In which Places a more plenary Remission is understood, that is, such an one as restores the Offender into his former State of Friendship; from whence it follows, that no Punishment ought to be required of him. Besides, tho' no signs of such Repentance do appear, if the Damage we sustain be not very great, *Christ* by the Precept, of parting with our Coat, teaches us, that we ought patiently to bear it. And even *Plato* hath said, That we must not return Evil for Evil, tho' we should suffer

H h 3

(p) If he who has offended us, shews any Tokens of Repentance.] See *Moses Maimonides*, quoted by the Learned *Constantine* in his Book *de damno dato*, c. 8. §. 7.

suffer some considerable Aggrievance. The Sense of which words are to be met with likewise in *Maximus Tyrius*. And *Musonius* professes of himself, That for any small *Reproach* or *Affront* (such as a *Box* on the *Ear*, or the like) he would neither bring an *Action at Law* against any Man, nor encourage any other to do it, because such little Injuries are much better forgiven.

7. But if to *wink* at the *Faults* and *Offences* of others be attended with any great Hazard, we ought then to be contented with that *Security* of their Behaviour, which may do them the least Damage. For the Law of *Retaliation* it self was not in Force even amongst the *Jews*, as *Josephus* and other *Jewish* Writers observe; but the injured Person, besides his *Loss of Time*, and the necessary *Expences* of his *Cure*, of which *Expences* we have a distinct Law, *Exod. xxi. 19.* (q) (for this imports no more than *simple Restitution*, having nothing *Penal* in it) was wont, in lieu of *Retaliation*, to receive a *Fine*, which was practis'd too at *Rome*, as *Favorinus* in *Gellius* informs us. Thus *Joseph* the Foster-Father of *Jesus*, believing *Mary* guilty of *Adultery*, (s) had a mind to get rid of her by *Divorce*, rather than expose her and make her a publick Example: And this he is said to have done, because he was a *Just Man*, that is, an *honest* and *good-natured* Man; upon which place *St. Ambrose* has this Remark, *That the Just Man is free not only from the Cruelty of Revenge, but even (t) from the Severity*

(q) For this imports no more than *simple Restitution*, having nothing *Penal* in it.] *Lex Wisigoth.* 6, 13.

(r) A *Fine*.] See the same *Constantine* in his said B. c. 8. §. 1.

(s) Had a mind to get rid of her by *Divorce*.] *St. Austin*, l. 2. de adulterinis Conjugiis. But if a Christian (which is certainly very true) may not kill his *Adulterous Wife*, but only dismiss her.

(t) From the *Severity* of a *Prosecution*.] See *Hincmarus* de divorcio

Severity of a Prosecution. As also *Lactantius* had before said, *A Just Man must not even accuse a Person of a Capital Crime.* And (u) *Justin*, talking of those who accus'd the *Christians*, saith, *We would not have them punished who calumniate us: Their own Wickedness, and their Ignorance of what is good, is sufficient Correction for them.*

8. It remains that we say something of those *Punishments* that are inflicted, not for any *Private Advantage* but for a *Publick Good*; partly by putting to *Death*, or *disabling* the Criminal from doing any more *Mischief*, partly by *detering* others by the *Severity* of the *Example*; that those *Punishments* were not abrogated by *Christ*, we have proved by an *irrefragable Argument* elsewhere; since, when he delivered those *Precepts*, he gave this *Testimony* of himself, *That he did not destroy a Tittle of the Law.* But the *Law of Moses*, which in those *Cases* certainly continued in *Force* as long as the *Jewish State* continued, strictly commanded their *Magistrates* to punish *Homicides* and other great *Crimes* with *Death*, *Exod. xxi. 14. Numb. xxxiii. 14, 37. Deut. xxix. 13.* And if the *Precepts* of *Christ* were consistent with the *Law of Moses*, (x) as that *Law* required *Capital Punishments*, (y) well

H h 4

may

ad interrog. 7. in fine. c. laicos. 2. quest. 4. and Panormitanus there. Gail de pace publica. 8. 3. Add c. accusasti de accusationibus, as it is in Becard.

(u) *Justin.* He has this Expression too; *μὴ δὲ μισέειν ἀλλήλους &c.* Nor in the least willing to retaliate any one a *Mischief*, as our new *Legislator* has injoin'd us. Add to this what's below, § 17.

(x) *As that Law required Capital Punishments.* *Josephus* mightily cries up the *Pharisees* Clemency in Punishing. And from hence are there so many *Exceptions* in their *Laws* relating to publick *Punishments*; and that *Maxim* of theirs, that where there's a necessity to inflict *Death* it ought to be done in the *tenderest* manner, This is in the *Talmud*, tit. *Ketuboth*.

(y) *Well may they be consistent with Human Laws, which do in this Respect imitate the Divine.* *St. Austin* quest. *Evang. l. 1. quest. 10.*

may they be consistent with *Human Laws*, which do in this Respect imitate the *Divine*.

XI. The Argument drawn from the Mercy of God declar'd in the Gospel, answer'd:

XI. 1. Yet some there are, who, to maintain the *contrary* Opinion, alledge the great *Mercy* of God under the *New Testament*, which is to be imitated by all *Christians*, and even by *Magistrates* themselves as *God's Vicegerents*; which we grant to be true in some Measure, but yet that it is not to be extended so far as they would have it. For the great *Mercy* of God declared in the Gospel has *Regard* chiefly to *Sins* committed against the Law given to *Adam*, or against the Law of *Moses* before the Promulgation of the Gospel, *Acts* xvii. 30. *Rom.* ii. 25. *Acts* xiii. 38. *Heb.* ix. 15. For those which are committed *afterwards*, especially if they be persisted in with *Obstinacy*, are threatned (z) with Judgments much *more* severe, than those of the Law of *Moses*, *Heb.* ii. 2, 3. iv. 10, 29. Neither are they threatned with Judgments of the *other* Life only, but *God* often punishes such Crimes even in *this*, 1 *Cor.* xi. 30. Nor is Pardon for such Sins obtained, (a) unless the Party does, as it were, *Punish* himself, 1 *Cor.* xi. 3. by great Sorrow and Compunction, 1 *Cor.* ii. 27.

2. And they farther urge, that *Magistrates*, in Imitation of *God*, ought at least to *pardon* the *Penitent*. But, besides that it is scarce possible for Men to discern which are *true* Penitents, and that if *outward* Shews and Professions of Repentance were sufficient,

(z) *With Judgments much more severe than those of the Law of Moses.* St. Chrysostom says the same as well in his Oration *ad patrem fidalem*, as in his 11 *de jejuniis*.

(a) *Unless the Party does as it were punish himself.* A Sinner ought, before he gets his Pardon, to lament and bewail himself. Tertullian *de penitentia*. St. Ambrose upon Ps. xxxvii. St. Chrysostom upon 1 *Cor.* Hom. xxviii. and upon Matt. Hom. xiii. Add 2 *Cor.* vii. 9, 10.

sufficient, no Man but would come off with *Impunity*, *God himself* doth not always remit all kinds of Punishment even to the *true Penitent*, as appears by the Example of *David*. As therefore *God* might remit the Punishment of the *Law*, that is, a *violent* or an otherwise *untimely* Death, and yet inflict grievous Punishments upon the *Delinquents*; (b) so now in like manner he may remit the Punishment of *Eternal* Death, and yet either punish the Sinner with an *untimely* Death *himself*, or be willing that he should be so punished by a *Magistrate*.

XII. 1. But others again condemn this Proceeding too, because, together with *Life*, all Opportunity for Repentance is cut off. But they themselves know very well, that good *Magistrates* always take special Care, that no *Malefactor* be hurried away to Punishment, before he has had a sufficient Time allowed him to *confess* his Sins in, seriously to *detest* and *abhor* them, and to make his *Peace* with *God*; and that *God* doth sometimes accept of (c) such a Repentance, tho' good Works being prevented by the *Death* of the *Malefactor* do not follow it, is plain from the Example of the *Thief* crucified with *Christ*. And if it be said that *longer* *Life* might conduce much to a more *serious* and *perfect* Repentance, it may be answered, that Instances of those sometimes happen, to whom (d) this Saying of *Seneca* may be justly applied,

There

XII. *And that from the cutting off of the opportunity of Repentance.*

(b) So now in like manner he may remit the Punishment of eternal Death, and yet either punish the Sinner with an untimely Death himself.] St. Jerome upon the first Chapter of *Nabum*, which Passage is inserted *Caus. xxiii. quest. 5. Agathias l. 5. out of Plato.*

(c) Such a Repentance, tho' good Works, being prevented by the Death of the Malefactor, do not follow.] St. Jerome ad *Damasum*, cited in c. *importuna de poenitentia. dist. 1.*

(d) This Saying of *Seneca*.] Who has this Expression too in his *Treatise*

There is but one good thing more, that we can offer you, which is *Death*; and that other Expression of the same Author, *Let 'em cease to be wicked by the only Method they are capable of doing it.* Which is what *Eusebius* the Philosopher had said before, *ἔπειδ' αὖ ἂν οἷον* &c. *since they cannot be reform'd by any other means, let 'em this way freed from those Chains bid adieu to their Villanies.*

2. Let these therefore, together with what we have said in the Beginning of this Work, serve for Answers to those, who would either prohibit all Punishments in *Christian* Countries, or at least such as are *capital*, without Exception; contrary to which is the Doctrine of the *Apostle*, who in the Office of a *King*, includes the Power of the *Sword*, for the Execution of *Divine Vengeance*; and he saith in another Place, that we are to pray, that *Kings* may become *Christians*; and that as they are *Kings*, they may be a *Guard* to the *Innocent*: Which in this general Corruption and Depravity of Mankind, even *since* the Times of the *Gospel*, cannot be done; unless, by the *Death* of some the Audaciousness of others be restrained, seeing all the *Public* Punishments that are every where inflicted upon the *Guilty*, are scarce sufficient to protect the *Innocent*.

3. Nor will it be impertinent to propose to the Imitation of *Christian* Governors in some Respects, (e) the Example of *Sabacon* the *Egyptian King*,

a

Treatise de beneficiis 7. 10. *Death to such sort of People is the only Remedy and 'tis best for him to go quite out of the way, who is never likely to come to himself.* And again, *Just as I would do a Kindness to all Mankind, would I do this Favour to him, since to Folks of that Temper, Death alone is a Cure.*

(e) *The Example of Sabacon the Egyptian King.* Yes, and of the *Romans* too in most Cases; for none of 'em, after the *Porsian Law* was made, could ever be *Whip'd* or put to *Death*, unless he were a *Traitor*, or condemn'd by the *People* themselves.

a Man eminent for his Piety, by whom Capital Punishments were changed into certain *servile Works*, with a very happy Success, as *Diodorus* testifies: And *Strabo* says too, that there are some People bordering upon Mount *Caucasus*, who put no Man to Death, tho' the greatest of Malefactors. Nor is that of *Quintilian* to be slighted, No Man can doubt, saith he, but that if Malefactors could be reclaimed, and brought to behave themselves better, as 'tis granted they sometimes might, it would be more for the Advantage of the State, that they should live than die. It is observed by *Balsamo*, that the Roman Laws which condemned Men to Death, were most of them changed (f) by the succeeding Christian Emperors, (g) into other Punishments, in order both to impose on the Guilty a severer Method of Repentance, and also by the Length and Tedioufness of their Punishment to make it the more Exemplary.

XIII. 1. By the Enumeration we have made of the Ends of Punishment, it appears that *Taurus* the Philosopher has over-look'd some of them, out of whom *Gellius* thus: When, either there appear in the Malefactor great Hopes of Reformation without Punishment; or on the contrary no Hopes at all of his Amendment, even tho' he should be punished; or no great Reason to fear, that the Dignity of the Per-

XIII. Im-
perfect Di-
visions of
Punishment
rejected.

(f) By the succeeding Christian Emperors] See what's below in this B. ch. 24. §. 11. See *Isaac Angelus's* Oath in *Nicetas* l. 1. The same Author says that not one was executed in *Johannes Comnenus's* Reign. See *Malchus* about *Zeno*, and *St. Austin's* 158, and 159 Epistle to Count *Marcellinus*, cited c. *circumcellionas*, caus. 23. quest. 5. and in the following Chapters, and *St. Chrysostom* against the *Jews*, where he speaks of *Cain's* Punishment.

(g) Into other Punishments] Chiefly into Work. *St. Austin*, Epist. 160. If they have the use of their Limbs, let 'em be employ'd in some profitable Service. See also *Nectarius's* Letter to *St. Austin*; 'tis the 201st,

son, against whom the Offence is committed, should be slighted or contemned; or if the Offence be of such a Nature, as that it is not necessary to deter others from it by the Example; then is it scarce worth the while to put our selves to the Trouble of Punishing. For he seems thence to infer, that Punishments are needless, if any one of these Ends be wanting: Whereas, on the contrary, all these Ends must be wanting, that there be no need of Punishing. Besides, he omits That End, when an incorrigible Sinner is taken away, that he may not commit more or greater Sins; and what he said of the Loss of Dignity is to be extended even to all Damages which we have just Occasion to fear.

2. Much better is Seneca's Division of Punishments: In revenging Injuries, says he, the Law hath regard to these three things, which a Prince should likewise have regard to: (b) Either to reform the Person himself whom he punishes; or by making an Example of him to reform others; or to take away incorrigible Offenders, that the rest of the World may live in greater Safety: For here if we understand by the rest of the World, not only those who have been injured already, but those also who may be injured hereafter, we have a perfect Division, unless after the Word take away, or disable should have been inserted. For Imprisonment, or any other Punishment that disables the Malefactor from doing more Mischief, comes in under this Head. Less perfect is that Division of Seneca in another Place, All Punishment, saith he,

(b) Either to reform the Person himself whom he punishes, or by making an Example of him to reform others.] These two Designs of Punishment are also laid down by Philo in legatione; $\delta\tau\iota\ \chi\ \eta\ \kappa\omicron\lambda\alpha\sigma\iota\varsigma$ &c. Because Punishment does often correct and amend even the Offenders; but if it does not do that, it will certainly have an Influence on the Standers by. For other's Smartings make many People better out of a Fear and Apprehension of suffering so themselves.

he, is to be inflicted upon these two Accounts; either to reclaim the flagitious, or to take them away. And that of Quintilian is yet more imperfect than this, where he saith, *In all Punishments the Crime is not so much regarded, as the Example.*

XIV. From what has already been said, we may gather how dangerous it is for any private Christian (i) to punish any Man, tho' never so wicked, especially with Death, either for his own or the publick good, (k) although it be sometimes permitted by the Law of Nations, as we have shewn already. Hence is that Custom of those Nations much to be commended, where the Supreme Power grants Commissions to People going to Sea, to attack Pyrates where-ever they meet them; that they may make use of any Opportunity that serves, not as it were of their own Head, but by the expresse Order of the Publick.

XV. Not unlike to this is another Custom, which prevails in many Places, (l) where not any one who has a mind to it is allow'd to be a Prosecutor, but only some particular Men who are appointed by publick Authority; that so no Man may contribute towards the Effusion of his Neighbour's Blood, but only he who is obliged to it by his Office. Agreeable to this is that Canon of the Council of Eliberis, *If any Believer be an Informer, and another by his Informa-*

XIV. That it is not safe for private Christians to punish even when the Law of Nations permits 'em:

XV. Or to be forward in a Prosecution:

(i) To punish any Man, tho' ever so wicked.] See some Passages above, B. 1. ch. iii. Sect. 3.

(k) Although it be sometimes permitted by the Law of Nations, as we have shewn already.] In this very Chapter, Sect. viii.

(l) Where not any one who has a Mind to it is allow'd to be a Prosecutor.] St. Chrysostom de penitentia viii. καὶ ἐν ἑκ. 'Tis therefore a good Thing, as I told you, by a kind Composition of Matters to prevent a Suit of Law, and thus to direct your Friend to the very End that a Court intends. But if the Process be already enter'd, let it take its Course, only be sure never to begin one.

XVI. Or
to affect the
Office of a
Judge in
Capital
Crimes.

Matt. vi. 1.

XVII. Whe-
ther human
Laws, which
permit one
Man to kill
another,
grant him
a Right so
to do, or on-
ly Impunity
for doing it;
explained by
a Distin-
ction.

tion be either proscribed or put to Death, we have thought fit to forbid him the Sacrament even to the last.

XVI. And from what hath been already said, it may also be gathered how rash and indecent a Thing it is for a Man who is really a *Christian* (m) to thrust himself into publick Offices whose Business it is to Sentence Folks to Death, and to think and profess, that the Right of Life and Death over his Fellow-Citizens, may safely be committed to him, as the most excellent of all others, and a kind of God amongst Men. For certainly the Danger, that *Christ* admonishes us of in judging others (because as we judge others, we must expect to be judged our selves in like Cases by God) is altogether as true in this Affair.

XVII. 1. Another important Question may be asked, *Whether Human Laws which permit one Man to kill another, give him a Right so to do before God, or only Impunity amongst Men.* Covarruvias and Fortunius are for the latter, whose Opinion is so much disliked by Vasquez, that he calls it an abominable one. It is not to be doubted, as we have said elsewhere, but that the Law can do both in some Cases. But whether it does do so much or not, is to be gathered partly from the Words of the Law, and partly from the Nature of the Thing. For if it makes Allowances for the Transport of Passion, it only exempts from Human Punishment, but does not take away the Guilt; as in the Case of an Husband who kills his adulterous Wife, or of a (n) Wife killing her adulterous Husband.

2. But

(m) To thrust himself into publick Offices, whose Business it is to Sentence Folks to Death.] See Seneca de Otio Sapientis, canvassing this Question, *Whether a Wiseman ought to take upon himself a publick Concern.*

(n) A Wife killing her adulterous Husband.] See St. Austin de civitate Dei, cited, t. quinquaginta, Cauf. xxiii. quest. 8. And c. inter with the following c. Cauf. xxxiii. quest. 2.

2. But if it have Regard to the *Danger*, that may ensue by *deferring* the Punishment, then it is supposed to transfer a *publick* Authority to a private Person, so as that he now *ceases* to be a private Person. Of this kind is that Law in the Codes of *Justinian* under this Title, *Quando liceat unicuique sine Judice* &c. When it may be lawful for any one without appealing to the Judge, to revenge himself or the *publick* Oath, wherein free Permission is granted to every Man to restrain and punish by Force of Arms Soldiers, who shall be found plundering the Country. And the Reason of the Law is there added, *viz. That it is better to prevent Violences in their beginning, than to punish them afterwards. We permit you therefore to do your selves Justice, and what, it is too late to punish by a Course of Law we suppress by this Proclamation; hereby commanding, That no Man shall spare a Soldier, whom he's oblig'd Sword in Hand to defend himself against, as against a Thief and a Robber.* And to the same purpose is the subsequent Law, of punishing Deserters, which runs thus: *Be it known unto all Men, That against publick Robbers, and Soldiers who fly from their Colours, Power is hereby given to every Man to execute publick Revenge for the common Safety.* And thus is that of *Tertullian* to be understood (o) *Against Traitors and publick Enemies, every Man is a Soldier.*

3. And herein the Right of killing *Envoies*, when found within the Dominions they are banished from, differs from the Laws just mention'd, inasmuch as that a particular Sentence must have been already

(o) *Against Traitors and publick Enemies every Man is a Soldier.* *Agathaur.* iv. 3. *De Garayis.* Sec. A Resolution of wishing and doing well to the Publick, is not peculiar to Generals, or other great People, but every one who will may, and 'tis for his Reputation, be troubled at the Calumnies of the State, and do all he can to put Things in a better Posture. See above in this Chapter, Sect. ix.

dy passed upon the one; whereas in the other Case a general Edit, (p) together with the Evidence of the Fact, has the Force of a particular Sentence.

XVIII.

That Internal Acts are not punishable by Men.

XVIII. Now let us see whether all kinds of vicious Acts ought to be punished by Human Laws. And certainly they ought not. For first the internal Acts of the Mind, though they be afterwards made known to others by Confession or any other Accident, cannot be punished by Men, because, as we have said elsewhere, it is not agreeable to Human Nature, that any Right or Obligation should arise amongst Men from Acts merely internal. And in this Sense are the Roman Laws to be understood, when they say, *Cogitationis Penam neminem mereri*, No Body deserves to suffer for his Thoughts. But yet these internal Acts, (q) as far as they influence the external ones, are brought into the Account, not simply of themselves, but by Reason of the external Acts, which from the Intention receive the Aggravation or lessening of their Crime.

XIX. Nor External Acts, that are unavoidable by Human Nature.

XIX. 1. Secondly, Those Acts that are unavoidable by Human Nature, are not to be punished by Human Laws. For though nothing be imputed to us as a Sin, but what hath the Concurrence of the Will, and is done freely; yet to abstain altogether, and at all Times from all kinds of Sin is above the Strength and Condition of Human Nature; whence it is, that all Sorts and Sects of Men have accounted it Natural for a Man to Sin. As amongst Philosophers, Sopater, Hierocles, (r) Seneca; (s) amongst

(p) Together with the Evidence of the Fact.] Quintilian in his cclixth Declamation: There are some Crimes against the State so notorious, that the bare sight of 'em is enough to declare 'em Capital.

(q) As far as they influence the external Ones.] So Sagraus l. iii. Thesauri, c. 6.

(r) Seneca.] And in his same Book, de ira c. 14. There's no Man living who can entirely justify himself. In his sixth Chapter he had said,

(s) amongst the Jews, *Philo*; amongst Historians, *Thucydides*; and amongst Christians, very many have left us their Testimony upon Record. If, saith *Seneca*, every Man, who is of a depraved corrupt Nature were to be punished, no Man would go unpunished. To the same purpose is that of *Sopater*: He, who is rigid enough to punish Men as severely, as if it was possible for them to live altogether without Faults, must certainly exceed the Bounds of Correction. Which (r) *Diodorus Siculus* calls a Wrong done to the common Frailty and Weakness of Men; and in another Place, he says, It is to forget the Weakness, that is common to all Mankind. For as the same *Sopater* saith, Our lesser, and as it were daily slips of Infirmary are rather to be con-
 nived at than punished.

2. And indeed it may well be doubted, whether these can truly and properly be called Sins,
 VOL. II. I i since,

said: Among many other Inconveniences of Mortality, the Darkness of our Understanding is one, and not only the necessity of erring, but the doating upon our Errors. Afterwards ch. 27. Who can declare himself Free from the Breach of every Law? And in B. iii. ch. 20. We are all of us Bad. In his Treatise de Clementia i. 6. We are all Faulty: Some more, some less; some on purpose, others by Accident or drawn away by another's Wickedness; some of us have been a little too weak in standing to our good Resolutions, and have lost our Integrity with Regret and Reluctance. Nor do we only for the present do amiss, but we shall always do so to the last Moments of our Lives. And if there be any one who has so well clear'd his Conscience that nothing can any longer either disturb or deceive him 'tis even by frequent Mis-
 carriages that he arrives to this State of Innocence. *Procopius Gothic.* iii. in a Speech of *Belisarius*: τὰ πλεῖστα ἡμῶν ἔστιν ἁμαρτία. Not to Sin at all is neither consistent with human Make, nor will the Nature of Things allow it. Add to this the Emperor, *Basil* c. 50.

(s) Amongst the Jews *Philo*.] In his third Book de Mose. To which may be added, *Aben Ezra* upon *Job* v. 7. and *Rabbi Israel* c. 8.

(r) *Diodorus Siculus*] And in his Fragments he says, μὴ στυγάζωμεν τὴν ἀνθρωπίνην φύσιν, τὴν ἀδύνατον, we must not disparage the Infirmary of Human Nature.

since, though every particular Act may seem to be done freely, we lie under a kind of *Necessity* in general to Sin. Every Law, saith *Plutarch* from *Solon*, ought to be made against things that are possible to be observed, if it intend to punish a few with Advantage, and not a Multitude to no purpose. There are likewise some Sins, that are not Absolutely unavoidable to Human Nature, but to this or that particular Person, or to this or that particular Age, (u) by Reason of such or such a Temperament of the Body strongly inclining the Mind, or by some inveterate Custom, which yet are commonly punished, not so much for themselves, as (*) for the preceding Fault that occasioned them, because either the Remedies were neglected, or the Depravity voluntarily contracted.

XX. Nor those Acts, that are neither directly nor indirectly hurtful to human Society; the Reason of which is assign'd.

XX. 1. Thirdly, those Sins are not to be punished, which neither directly or indirectly concern Human Society, nor any Body else. Because no Reason can be assigned, why the Punishment of such Sins should not be left to God, who is most wise to understand, most righteous to weigh, and most mighty to revenge them. Wherefore all Human Punishments, as to such Sins, are plainly unfit, and of consequence improper. But those Punishments are to be excepted, that tend to the Reformation of the Party Transgressing, though perhaps no other may have any Interest in it. Nor are Actions to be punished, that are done in Opposition to Virtues, which by their very Nature

(u) By Reason of such or such a Temperament of the Body strongly inclining the Mind] *Seneca de ira*, l. ii. c. 18. 'Tis the Mixture of the Elements that causes a variety of Manners, and therefore some Peoples Tempers incline 'em more to this or that according as any one Element does predominate. In another place he calls this, the Result of the Condition of our Birth, and the Complexion of our Bodies. *Epist. xi.*

(*) For the preceding Fault.] See c. *inebriaverunt. caus. xv. quest. 1.*

are averse from all Compulsion, such as Mercy, Liberality and Gratitude.

2. Seneca discusses this Question, Whether the Vice of Ingratitude ought to go unpunished; and why it ought he alledges many Reasons, particularly this, which will likewise hold in other Vices of the like Nature: Since, says he, it is highly Praiseworthy to be grateful, it would cease to be so, if we were bound to be grateful; that is, it would not be Praiseworthy in any eminent Degree, which he thus explains in the subsequent Words: For, if Ingratitude were punishable, no Man would more commend a grateful Man, than he does him, who restores what was given him in Trust, or than he does him, who pays his just Debts without being forced to it by Law. And soon after: It would not be so glorious to be grateful, (y) unless we might be ungrateful with Security. And to these kinds of Vices may be referred that of Seneca the Father in his Controversies, (z) I do not desire that the Criminal should be commended, but only acquitted.

XXI. It remains now that we enquire, whether we may not sometimes forgive or pardon Offences.

XXI. The Opinion of those, who hold that it is never lawful to Pardon, reject.

(y) Unless we might be ungrateful with Security.] The same Seneca de beneficiis l. c. 1. Thus is it a base Thing not to return a kindness, tho' it be what we are not accountable for. Seneca the Father, Controv. v. 34. You tell me that we are not oblig'd to do it; because 'tis a Thing of such a prodigious value, that there's no occasion to award any Punishment for the neglect. St. Austin l. ii. c. 83. contra Petilian: Thus then because there are Laws against you, you are not compell'd by 'em to do Good, but you are forbidden to do any hurt.

(z) I don't desire that the Criminal should be commended but only acquitted.] This is in B. iv. Controv. 23. You have such another Expression in the same Book. Controv. 24. There's a great deal of Difference between Reproof and Punishment. For as Plutarch in his Cimon says, some Things are ελλείματα μάλλον ἀρετῆς τινος ἢ κακίας ποινῶν, rather the defects of some Virtue than the Crimes of Vice.

fences. (a) For the *Stoicks* deny it, as appears by a Fragment in *Stobæus*, entitled, *de Magistratu*, in *Cicero's* Oration for *Muræna*, and at the end of *Seneca's* Books *de Clementia*, but their Argument is very weak. *Pardon*, say they, *is the Remission of a Punishment that's due, but a Wise Man will do what he ought to do, and will give every one his due.* Here the Fallacy lies in the Word *due*. For if by *due* be meant, that he, who has offended, *ought to be punished*, that is, may be punished without *Injustice*, it will not follow from hence, that he, who *forbears* to punish him, does what he *ought not to do*. But if it be meant, that *Punishment* is in such a Manner *due* from a Wise Man, that he is indispensably *obliged to exact* it, we say, that that doth not always happen, and therefore in this Sense *Punishment* is not always *due*, but *lawful* only. And that may be true, as well before the *penal Law* as afterwards.

XXII. 'Tis
shown here
that Punish-
ment is al-
lowable be-
fore the Estab-
lishment of any
Penal Law.

XXII. 1. Yet it is not to be doubted, but that *before* the *penal Law* be made, an Offence may be *punished*, because he, who has offended, *naturally* brings himself into such a Condition, as that he may *justly* be punished: (b) but it does not follow from hence, that *Punishment* must needs be *exacted*; because this depends upon the Connection of the *Ends*, for which *Punishment* was instituted, with the *Punishment* it self. Wherefore if those

(a) For the *Stoicks* deny it. [Diodorus Siculus in his Fragments argues very well against 'em that, αὐτὴν νόμον τιμωρίας αἰσχροῦ τῆς παρὰ. *Pardon* is better than *Punishment*. And St. Cyprian shall speak for *Christians* in his liid Epistle. The *Philosophers* and *Stoicks* are of another Opinion, who say that all *Sins* are alike, and that a *Wise Man* must not easily be bent. But *Christians* and *Philosophers* do widely disagree.

(b) But it does not follow from hence that *Punishment* must needs be *exacted*. [Julian de Eusebia: ἡ δὲ καὶ ἐν οὐδὲν ἔστι. &c. For though there are some who deserve ill Treatment and Correction, there's no necessity that they should be quite destroy'd.

those *Ends* be not in a Moral Sense *necessary*, or if quite *contrary* *Ends* do occur no less *Profitable* or *Necessary*, or the *Ends* proposed by *Punishment* can be obtained *another* way, then it plainly appears, that there is nothing, which can strictly *oblige* us to exact *Punishment*. An Instance of the *first* Case is; when an Offence is committed so *privately*, as that it comes to the Knowledge of but very few, so that a *publick* Discovery of it, may not only be *unnecessary*, but even *hurtful* according to what *Cicero* said in the Case of one *Zeuxis*; *Being put into the Hands of Justice, he ought not perhaps to be dismissed, but there was no Necessity that he should have been put there at all.* Of the *second* in him, who commits an Offence, which is *overbalanced*, either by his *own* or his *Ancestors* Merits. For then as *Seneca* well observes, *The supervening Service covers and conceals the Injury.* Of the *Third* in him, who *mends* upon a bare *Reproof* only, or makes the offended Person *Satisfaction* by asking his *Pardon*; so that for those *Ends* there is no need of *Punishment*.

Ad Q. Fr.
1. 11.

2. And this is that part of *Clemency*, which exempts from *Punishment*, with Regard to which the Wise *Hebrew* hath declared, *That it becometh the Just to be merciful.* For since all *Punishment*, especially if it be severe, has something in it self that is *repugnant*, not indeed to *Justice*, but *Charity*, surely our common *Reason* will easily suffer us to abstain from it, unless a *greater* and more *extensive* *Charity* irresistibly hinder us. Very apposite to which is that of *Sopater*, where he says, that *That Justice, which is conversant about Contracts, admits of no Favour, but that, which is conversant about Offences, puts on sometimes the mild and gentle Countenance of the Graces.* The Sense of the former Part of which *Cicero* has expressed in these Words: *Via Juris ejusmodi est quibusdam in Rebus, ut nihil*

Wisd. xii.
19.

Orat. ad
Alex,

fit Loci Gratia. The Manner of doing Justice is in some Cases of such a Nature, as to leave no Room for Favour: and of the latter Part *Dion Prusæensis* thus: *χρηστὴ ἡμεῶν* & *συγγνώμη.* It is the Duty of a good Prince to pardon. And in *Favörinus*: That which Men call Clemency, saith he, is nothing but a reasonable Mitigation of the Rigour of the Law.

XXIII.
But not al-
ways.

XXIII. And these three Things may happen, either that some Punishment is to be indispensably exacted, (c) as in Crimes of the most pernicious Example; or that it is not to be exacted at all, as when the Publick Good requires that it should be omitted; or that we may do either one or t'other, as we think convenient. To which Intent is that of *Seneca*, That Clemency acts with Liberty and Choice. The Wise Man, say the *Stoicks*, spares, but does not pardon. As if we might not with the *Vulgar*, the great Lords of Expression, call that, to pardon, which they call, to spare. But in this as well as other Points, as *Cicero*, *Galen*, and others have observ'd, a great Part of the Disputations of the *Stoicks* (d) is spent in Nothing, but Words, which a Philosopher more especially ought to avoid. For as the Author to *Herennius* truly remarked, 'Tis ridiculous and a Fault to raise a Controversie about the Alteration of Names: Which *Aristotle* had express'd thus: *We must take Care to shun quibbling about a Term.*

XXIV.
And also af-
ter the Penal
Law is
made.

XXIV. 1. There seems to be a greater Difficulty after the penal Law is made; because the Law-Maker is in some Measure bound by his own Laws;

(c) As in Crimes of the most pernicious Example] *Josephus*: ἀντροκτορία νόμος, &c. Parricide is a common Injury both against Nature and Human Life, and whoever does not punish it, does himself sin against Nature.

(d) Is spent about nothing but Words.] Out of Use, as the *Schoolast* upon *Horace* says, *St. Austin* contra academicos: 'Tis absurd to keep a Stir and Wrangling about Words, when there remains no Dispute at all about Things.

Laws; but this only holds, as we said before, (e) as far as the *Law-Maker* is looked upon as a *Member* of the *Community*, not as he is the *Representative*, and carries with him the *Power* and *Authority* of the *State*. For as such he may take away even the *whole Law*; for the Nature of an *Humane Law* is such, that it depends upon the *Will* of the *Legislator*, not only in its *Institution*, but also in its *Duration*. But the *Law-Maker* ought not to take away the *Law*, without a *Reasonable Cause* for it, which if he does, he transgresses the *Rules* of *Political Justice*.

2. But as he can take away the *whole Law*, so he may suspend the *Obligation* of any *Part* of it, as to this or that *Person*, or this or that particular *Fact*, the same *Law* in all other *Respects* remaining in *Force*, after the Example of *God* himself; who, as *Lactantius* observes, when he gave *Men Laws*, did not deprive himself of the *Power* of pardoning such as should transgress those *Laws*. (f) *A Prince*, saith *St. Austin*, may revoke a *Sentence*, and absolve and pardon the *Person* condemned to die: And gives this Reason for it, that he is not subject to *Laws*, who has *Power* to make 'em. *Seneca* is for having *Nero* to reflect upon this *Sentence*: *No Man* can kill contrary to *Law*, and no *Man* can save besides my self.

I i 4

3. But

(e) As far as the *Law-Maker* is look'd upon as a *Member* of the *Community*.] See what's above in the *Text* and *Notes*, in this *Book* ch. 4. § 12.

(f) *A Prince* may revoke a *Sentence*, and absolve and pardon the *Person* condemn'd to die.] *Symmachus* l. iii. *Epist.* 63. For the *Circumstances* of *Magistrates* and *Princes* are quite different; the *Judgment* of the *Magistrate* is thought to be corrupted, if it be milder than the *Laws* direct: But it is in the *Power* of, and very becoming the *Character* of *Godlike Princes* to alter the *Rigor* of a severe *Sentence*. There's the same *Distinction* between a *King* and a *Judge* in *Themistius*. *Oration.* 5.

3. But neither is this to be done without a *reasonable Cause*. And what these *reasonable Causes* are, tho' we cannot precisely define them, yet we must conclude, that they ought to be greater, *after* the Institution of the Law, than *before*, because the Authority of the Law, which 'tis fit should be maintained, is *superadded* to the other *Causes* of *punishing*.

XXV.
What rea-
sonable in-
trinsic Cau-
ses justify
the doing
of it.

XXVI.
What ex-
trinsic ones.

XXV. But the *Causes* of *exempting* any one from the *Penalty* of the Law are either *intrinsic* or *extrinsic*. 'Tis *intrinsic*, when the *Punishment* compared with the *Fact* is *severe*, if not *unjust*.

XXVI. *Extrinsic* is from a Man's former *Merit*, or some other Thing that speaks in his *Favour*; or even from great *Hopes* of him for the Future: Which kind of *Cause* will then most prevail, when the *Reason* of the Law (at least in that particular *Fact* he is accused of) shall *cease*. For tho' the *general Reason* of a Law without the counter-balance of a *contrary Reason* be sufficient to support the *Authority* of the Law, (g) yet when the *Reason ceases*, as to *this* or *that* particular Case, it makes the Law be dispensed with, more *easily* and with less *Detriment* to its *Authority*. And this takes Place the most in those *Crimes* which are committed through *Ignorance*, tho' that *Ignorance* be not altogether *blameless*, or through an *Infirmity* of the Mind, that is *superable* indeed but not without great *Difficulty*; which a *Christian Prince* should put a *favourable Construction* upon, after the Example of God himself, who in the *Mosaick Dispensation* was graciously pleased to provide, that *Sins* of this Kind should be expiated with

cer-

(g) Yet when the Reason ceases as to this or that particular Case, it makes the Law be dispensed with more easily and with less Detriment to its Authority] Gratianus has collected and put together several useful Things upon this Subject. *caus. 1. quest. 7.*

certain Sacrifices, *Lev. iv. and v.* And in the *New Testament* he has declared both by *Words* and *Examples*, that he is ready to pardon such Sins upon *Repentance*, *Luke xxiii. 34. Heb. iv. 15. v. 2. 1 Tim. i. 13.* And 'tis observ'd by *St. John Chrysostome*, that those Words of Christ in *St. Luke*, *Father forgive them, for they know not what they do, (h)* wrought so much upon *Theodosius*, that he freely forgave the *Antiochians*.

XXVII. And from hence appears the Error of *Ferdinand Vasquez*, who said that the *Laws* were never to be *dispensed* with, but in such Cases as the *Maker* of 'em, had he been consulted, would have acknowledged that he did not design that they should be *binding*. For he has not distinguished between an *equitable Interpretation* of the Law, and a *Relaxation* of it. Whence it is, that 'in another Place he reproves *Aquinas* and *Scotus* for saying, That the *Law* does still oblige, tho' the particular Reason of that Obligation cease, as if they took the Law to consist in the bare *Letter*, which they never thought of. But it is so far from being true, that every *Relaxation* of the Law, which may be made or omitted at Pleasure, is *Equity* properly so called, that that *Relaxation*, which is made either out of *Charity* or *Policy*, does not come within the Bounds of it. For it is one Thing, to take away the Efficacy of a Law for some *reasonable* or even *urgent* Cause, and another to declare, that the Fact was never comprehended under the *Intention* of the Law. So much for *taking away* or *exempting* from Punishments: Let us now see how we are to put 'em in *Execution*.

XXVIII. From what has been already said, it appears, that in Punishments *two* things are to be con-

XXVII.
The Opini-
on, that
there's no
just Reason
for dispens-
ing with a
Penalty but
what is in-
cluded in the
Law by way
of Tacit Ex-
ception, re-
jected.

XXVIII.
The Punish-
ment is to be
proporti-
on'd to the
Crime.

(h) Wrought so much upon Theodosius.]. See the Story in Zonaras.

considered, the Reason *why* and the *End* for which. The Reason *why*, is the *Demerit*; the End for which, is the *Advantage* of Punishment. (i) No Body is to be punished above his Desert, according to those Passages of *Horace*, which we have before quoted, and that of *Cicero*, *There is a Measure, saith he, and Moderation to be used in Punishing, as well as in all other Things.* And therefore *Papinian* calls Punishment the *Valuation of a Crime*. And *Aristides* saith, *That it is agreeable to humane Nature, that Bounds should be set, beyond which Revenge should never pass.* But *Demosthenes* in his Epistle for *Lycurgus's* Children, says that we are not to observe so strict an *Equality* in Punishments as in *Weights* and *Measures*, but to have *Regard* to the *Purpose* and *Intention* of the Delinquent. And 'tis in Proportion to this *Demerit*, and with Respect to the Advantage thence arising, that Faults are *more* or *less* punish'd.

Leuctr. 2.

XXIX. Regard is to be had here to the Motives which we are to compare with one another.

XXIX. 1. In the *Demerit* of the Crime, we are to consider, (k) the *Motive* that induced, the *Reason* that ought to have restrained, and the *Fitness* or *Capacity* of the Person either to one or t'other. There is hardly any Man wicked for *Nothing*, and if there be any one who loves Wickedness for its own sake, he is no longer *Man*. The greatest Part of the World are drawn into Sin by their Affections.

(i) *No Body is to be punish'd above his Desert.*] The People of *Milan* argue very handsomly upon this Affair in a Speech of theirs related by *Guicciardin* l. 17. Compare what we had in this Chapter §. 11. and what we shall have in B. 3. ch. xi. §. 1.

(k) *The Motives that induced.*] *Chrysoft.* x. de statuis: 3. 78. 2. 11. πᾶν, &c. For every Offence does not deserve the same Correction, but what might easily have been amended requires the greater Punishment. And in his second Oration entitl'd *Cuius obsecrum sit vetus Testamentum* he proves from hence that a *Slanderer* is worse than a *Whoremonger*, *Thief* or *Murderer*.

ons. *When lust hath conceived, it bringeth forth sin. Jam 1.15*
Where under Lust or Appetite, I comprehend also That vehement Desire of declining every thing that may hurt us, which of all others is the most natural, and consequently the most innocent. And therefore those Sins, that are committed to escape Death, Imprisonment, Pain, or extream Poverty, seem to be the most excusable.

2. Agreeable to which is that of Demosthenes, *If a rich Man be unjust, it is fit that he should be much more severely punish'd, than a Poor Fellow whose Poverty forces him to commit the same Crime.* For before Judges, who have any Sense of Humanity, Necessity pleads strongly for Pardon, whereas they who in Affluence and Plenty do an Act of Injustice, can have no tolerable Pretence to urge in their Favour. Thus does Polybius excuse the Acarnanians, who to avoid the imminent Danger, that threaten'd them, broke the Articles of their League with the Greeks against the Aetolians. And Aristotle says, *Incontinence is more voluntary than Cowardice: For That proceeds from a Prospect of Pleasure, This from an Apprehension of Mischief.* (1) And this Apprehension doth, as it were, transport a Man out of himself, putting Nature all into Confusion, whilst the Idea of Pleasure doth no such Thing; (m) and therefore Incontinence is the more voluntary Vice. To the same Purpose there

(1) *And this Apprehension doth as it were transport a Man out of himself.]* See an admirable Comparison between a Thief and an Adulterer. Prov. vi. 30.

(m) *And therefore Incontinence is the more voluntary Vice.]* Philo upon the Decalogue, πάντα μὲν γὰρ τῆς ψυχῆς &c. For all the Passions of the Soul are troublesome and disorderly, hurrying her out of her natural State and never suffering her to recover her native Strength. But Lust is of all others the most troublesome and disorderly, for each of them invades and falls upon us from without, and so seems to surprise us against our Wills; Lust alone has its Principle in our selves, and is altogether of our own chusing.

there is, (n) a famous Passage in *Porphyrus* l. 3. *De non esu Animalium*.

3. All other *Appetites* do tend to some *Good*, either *real* or *imaginary*. Those Things that are *really good*, besides the *Virtues* and their *Acts*, which never lead to *Sin* (ἀντακολουθεῖσι ὃς αἱ ἀρεταί, *For the Virtues follow one another*) do either themselves afford *Pleasure*, or are the Cause of such Things as procure it, such as *Abundance* of *Riches*. But *Ambition* (or the *Desire* of excelling others, as that *Desire* is separated from *Virtue* and *Profit*) and *Revenge*, (o) are *imaginary* not *Real Goods*: And the more they deviate from *Nature*, the worse and more detestable they are. And these three *Appetites* St. *John* expresses in these Words: Ἐπιθυμία σαρκός, ἐπιθυμία τῶν ὀφθαλμῶν, ἀλαζονεία τῆ βίης. *The Lust of the Flesh, the Lust of the Eyes, and the Pride of Life*. The first whereof comprehends the *Desire* of *Pleasure*, the second of *Profit*, the third of *Vain-Glory* and *Resentment*. And *Philo* in his *Exposition* of the *Decalogue* derives all that's evil from *Desire* of *Riches*, *Honour*, or *Pleasure*. And *Lactantius* in his sixth Book makes all *Virtue* to consist, either in restraining our *Anger*, in bridling our *Lusts*, or in moderating our *Avarice*. For almost all our unjust and wicked *Actions* do spring from these *Affections*. And this is what he repeats elsewhere.

XXX. 1. The

(n) *A famous Passage in Porphyrus*] And such another in *M. Antoninus* in the second Book of his *Life*, where he compares *Anger* and *Ambition* together. *Plutarch* in his *Romulus* ἡ δὲ κινήσασα &c. *The Principle that moves the Mind allows a much handsomer Excuse to him, who by some mightier Cause, as by a stronger Shock and Impulse, is perverted.*

(o) *Are imaginary, not real Goods.*] *Seneca* *Epist.* xvi. Our natural Wants have some Bounds to 'em, but those that result from a false Opinion are infinite. See *Chrysost.* in *Tract.* *Moral.* ad *Rom.* vi. ad 2 *Cor.* xi. 12. ad *Ephes.* i. 14.

XXX. 1. The Cause which in general ought to restrain a Person from offending is *Injustice*. For we are not treating here of every sort of Offence, but of those which have Relation to some other Person besides that of the Offender. Now the greater the Damage is, that is done to another, the greater is the *Injustice*. Therefore Offences actually consummated hold the first Place, the next those which have proceeded to some Acts but not to the last of all; amongst which that is the most heinous which has proceeded the farthest. In either Kind that is the most notorious Injustice which disturbs the general Order of Humane Society, and therefore hurts the most: Next to it is that which touches particular Persons; with Respect, in the first Place to their Life; in the Second, to their Family, the Foundation of which is Marriage; in the last, to all other Things that are apt to be coveted, whether by directly taking them away, or by causing Damage in any fraudulent Manner.

2. These Things are capable of a more subtle Division; but the Order we have observed is that which God himself has followed in the Decalogue. For under the Name of Parents, who are our natural Magistrates, it is reasonable to understand other Rulers also, by whose Authority Humane Society is preserved. After this follows the interdicting of *Man slaughter*; then the Establishment of *Matrimony*, by prohibiting *Adulteries*: Then *Thefts* and *Falshoods*; in the last Place Offences not consummated and imperfect. Now amongst the Causes restraining, Consideration must be had not only of the Quality of what is directly done, but also of what wou'd have probably follow'd; as in the Attempt of setting a Town on Fire, or breaking down a Dam, we ought to regard the extream Calamities and Deaths of a Multitude of People.

XXX. And the Causes too which ought to restrain us: Whereof the Degrees of the Precepts in the Decalogue with Respect to our Neighbour, and some other Things.

3. To that of *Injustice*, which we have laid down as a general restraining Cause, (p) there is sometimes annex'd some other *Vice*, as for Instance, *Impiety* towards Parents, *Inhumanity* to those of ones Kindred or Neighbourhood, *Ingratitude* to Benefactors, which aggravate the Offence. (q) The Frequency of the Offence is still a stronger Indication of a depraved Mind; because evil Habits are even worse than evil Actions. And hence we may understand how far the Practice of the Persians was agreeable to natural Equity, (r) that the preceding Course of Life be brought into Account with the Offence it self. For this ought to take Place in those who, being innocent in other Respects, have been on a sudden prevail'd upon by some Temptation to commit a Crime; not in those who have perverted their whole Course of Life: with Respect to whom God himself says in *Ezekiel*, that he makes no Account of their former manner of Life, and to whom therefore may be apply'd that of *Thucydides*, They deserve double Punishment in that from being good Men they are become bad: because, as he says in another Place, They do not offend out of Conveniency.

c. xviii.

Lib. iv.

Lib. iii.

4. And therefore the ancient Christians did very well to require that in proportioning of Canonical

(p) There is sometimes annex'd some other Vice.] See a famous Passage in *Lucius's* Life in *Xiphilinus* out of *Dion*.

(q) The Frequency of the Offence] τὸ μὲν δὲ ἀγνοῖσθαι &c To be ignorant now and then in what concerns our Life, is what any Man may be subject to; but to offend often in one and the same Thing in the Perfection of Folly and Madness: For the more frequent the Vices are we fall into, so much the greater is the Punishment we deserve.

(r) That the preceding Course of Life be brought into Account with the Offence.] *Alinius Pollio*: We must form our Judgment of a Person from the greater Part of his Life and Behaviour. *Cicero* in *Sul*. In all Affairs of Moment and Concern, Judges are to consider the Intentions, Thoughts and Fact of the Party accus'd, not from the Crime he's charg'd with, but from his Manners.

nical Punishments (s) they shou'd not look upon the bare Offence, but at the same Time also the Course of Life both before and after the committing it, as appears from the *Ancyran* and other Councils. But, besides, when a Law is made against that which is in it self a Vice, it superadds a special Aggravation to it; as St. *Austin* shews in these Words (t) *The Prohibition of a Law doubles all Offences: For to be guilty of what is not only bad in it self but also forbidden, is not to be reckon'd a single Sin; and Tacitus in these, If you are for doing what is not yet forbidden, fear least you may be forbidden: But if you transgress in Things actually prohibited, with Impunity, there is neither Fear nor Shame remaining to restrain you.*

Rom. vii.

113.

De vera
Relig. c. 6.

Ann. 111.

XXXI. 1. The *Fitness* of a Person, either to reflect upon the Causes that might restrain from offending, or to receive the Affections that excited to it, is usually observ'd from the Constitution of the Body, the Age, Sex, Education, and Circumstances of the Act it self. For Children and Women, and People of a dull Disposition, and of a bad Education, do not so well distinguish just from unjust, lawful from unlawful. And again, those in whom Choler abounds are subject to Anger, as those of a san-

XXXI.

The Capacity also of the Offender either for one or 'tother, which Capacity is variously consider'd.

(s) *They should not look upon the bare Offence.*] The xxvth Canon of the Council of Engu'y. St. Chrysostom upon 2 Cor. Ch. ii. ὁθεν μανθάνομεν &c. From whence we learn that Penance ought to be determin'd and proportion'd, not only according to the Nature of the Sin, but also according to the usual Inclinations and Carriage of the Persons sinning. And in his third Book de sacerdotio: ὃ δὲ ἀπλῶν &c. For we must not suit the Punishment to the Measure only of the Offences but we must inquire too into the Intension of the Offender.

(t) *The Prohibition of a Law doubles all Offences.*] And to this Purpose St. Chrysostom says very well: ἐπεὶ αὐτὰ καὶ μόνον &c. Here he (the Apostle) shews that not only the Jew and the Greek are entitled to an equal Regard, but that the Jew is abundantly more burden'd by having the Law given to him. And then he goes on: ὃ δὲ πλεον &c. For he who enjoys greater Opportunities of being instructed, deserves, if he transgresses, the greater Punishment.

Sanguine Constitution are to *Lust*; besides the Inclinations of *Youth* and *Old Age* are different. Thus *Andronicus Rhodius*, *The Natural Make of a Man* seems to plead somewhat in his *Excuse* for doing amiss, and to render his *Offence* more tolerable. The Thought of an imminent *Evil* excites *Fear*, and a *fresh* and as yet not asswaged *Grief* *Peevishness*, so that those *Passions* will scarce ever suffer *Reason* to be heard; and the *Offences* occasioned by such *Affections* are deservedly less odious than those which arise from the *Desire* of *Pleasure*, which on the one hand is not altogether so violent, and on the other may be put off, and easily (u) without a *Crime* find other *Matter* to work upon. To which Purpose is that of *Aristotle* in the seventh Book of his *Nicomachia*, *Anger* and *Vexation* are more natural than a *Desire* of *superfluous* and *unnecessary Things*.

2. For this must be always observed, that the more the *Judgment* is hindred in making its *Choice*, and the more natural the *Causes* are by which it is hindred, the less is the *Offence*. So *Aristotle* in the fore-mentioned Book, *A Man*, who, being not at all, or but lightly moved by his *Concupiscible Appetite*, seeks after forbidden *Pleasures*, or flies at the approach of a slight *Calamity*, I call more irregular than one who

(u) And easily without a *Crime* find other *Matter* to work upon.] St. Chrysostom to the Galatians: ἢ ἐμθύπια μίξιν ἐμζήταί μόνον, ἢ τοιαύτῃ μίξιν, Lust only requires a Bed-Fellow, not this or that particular Woman. Tertullian l. 2. ad uxorem: It can't be thought to be excusable, if the Continence that encourages our Widow-hood be large, and yet we don't comply with it: For where the Performance is difficult the Pardon is easie. And as far as 'tis in our own Power to do so or so in the Lord, so much the more are you to blame, if you are not as observant as you can. And presently after: The greater Ability there was to have avoided the Sin, the greater is the Guilt of Contumacy in not avoiding it. Add Marcus Antoninus, in the Place just cited, where he has Theophrastus for his Author.

who is urged by the Vehemence of that Passion. For what may not such a one be supposed to do, if he was to feel the Violence of Juvenile Affections, or were oppressed with the Necessity of those things which it is grievous for Nature to be without? With which agrees that of Antiphanes,

(x) If when he's Rich he acts such Villany,
What wou'd he do if urg'd by raging Want?

As also what we frequently read in Comedies of the *Amours of Old Men*. From these Causes therefore it is that we are to examine the Merit of the Offence, and accordingly to settle and determine the Punishment.

XXXII. 1. But here we must observe, that what the Pythagoreans assert, that Justice is (y) τὸ ἀντιπαινεῖν, that it consists in Retaliation, or a Suffering by way of Punishment just as much as is the Mischief one does, must not be so understood as if he who has deliberately and without such Reasons as very much lessen the Crime, done a Damage to another, ought himself to suffer the same Damage and No more. For that this is not so, that very Law, which is the most perfect Pattern of all Laws, shews, when it commands Theft to be punished with a four-fold or five-fold Restitution. And by the Athenian Law a Thief, (z) besides the Penalty

XXXII.
That the
Punishment
may exceed
the Propor-
tion of the
Damage
done, and
why.

VOL. II.

K k

of

(x) If when he's rich, he acts such Villany.] Chrysostom de Providentia 4. ὡς ὅταν &c. When you see a Wealthy Man, Unjust, Avaricious and Griping, pity him the more because he acts so in such plentiful Circumstances; for his Punishment will be so much the severer for it.

(y) τὸ ἀντιπαινεῖν.] Harmenopolus calls it ταυτοῦ ἀδεια.

(z) Besides the Penalty of double Damages.] The Passage double unto her in *Revel* xviii. 6. alludes to this. Hercules Minyas made those who had unjustly extorted Tribute from the Thebans pay 'em twice the Value of it. *Apollodorus*, l. 2.

of double Damages, was imprisoned for some Days, as Demosthenes against Timocrates shews. *Larus*, says St. Ambrose, command that those things that are stolen from any one, be restored by inflicting corporal Punishment upon the Person, or by laying a greater Mulet upon him than the thing stolen was valued at, to the end they may either by the one deter, or by the other discourage a Thief from stealing. *Aristides* in *Leuctr.* 2. says, To those who prosecute injurious Persons in a judicial way, the Laws allow greater Damages by way of Revenge than they sustained. And *Seneca*, speaking of the Judgment after this Life, says,

The Punishments

Do there exceed the Greatness of the Crimes.

2. (a) Among the *Indians*, as *Strabo* observes, he that had maimed another, was, besides the Suffering of Retaliation, to have his Hand cut off. And in the great *Morals* which go under the Name of *Aristotle*, we read, It is not reasonable that he who has put out another's Eye, should only be punished with the Loss of his own, but that he likewise suffer something more. Neither indeed is it equitable that the injured and the injurious Person should suffer alike, as (b) *Philo* shews very well, where he treats of the Punishment of Manslaughter. And from hence also may an account be given, why some Offences, (c) though not consummated, and there-

(a) Among the *Indians*.] *Nicolaus Damascenus* has observed that some of the *Indians* punish Theft with Death.

(b) *Philo*.] In his second Book *de legibus specialibus*.

(c) Though not consummated, and therefore less than if they had been consummated.] *Pliny* speaking of a Lion. When he's wounded, 'tis with a wonderful Sagacity and Observation that he knows the Person who did him the Mischief, and, let the Crowd be ever so great, him he singles out. But

therefore *less* than if they had been *consummated*, bear a Punishment suited to the Injury *designed*, as we have an Instance in the *Jewish Law* (d) concerning *false Witness*, and in the *Roman Law* concerning him who went *Arm'd* with an intent to kill some Body. From whence it follows, that a *severer* Punishment should be contriv'd for Crimes actually committed; but since nothing can be *severer* than *Death*, and this cannot be *repeated*, as *Philo* observes in the Place above-mentioned, one's oblig'd to stop here; however, there may sometimes be the Addition of *Torments*, according to the *Heinousness* of the Fact.

Deut. xix.
19.

XXXIII. Now the Greatness of a Punishment is not to be estimated from what it is simply *in it self*, but with respect to the *Person* who suffers it. For the same Fine that is burthensome to a *poor* Man, is not so to *one* that is *Rich*; and an *Affront* which is but a *slight* Injury to a mean *Plebeian* Person, is a very *grievous* one to a Man of *Quality*. This Diversity is very much considered in the *Roman Law*, upon which *Bodin* framed his *Harmonical Proportion*; whereas here is only a simple *Arithmetical Equality* of the *Demerit* and the *Punishment*, as there is in *Contracts*, of the *Goods* and the *Money*, though the *Goods* may be worth *more* in one Place than another, and likewise the *Money*. But it must be owned, that often in the *Roman Law* this is not done *ἀνευ προσηγορίας*, that is, without too great a *Respect* had to *Persons* and

XXXIII.
The Opinion
of Harmonical Proportions in Punishments rejected.

K k 2

Cir-

if he who shot at him, and yet missed him, happens to fall in his way, he seizes him, and hales him down, but never offers to wound him.

(d) Concerning false Witness.] And concerning him who pretended to charge his Wife with not being a Maid, only to get her Fortune. Deut. xxii. 19. And concerning him who unjustly prosecutes any one, challenging what's another's to be his. Exod. xxii. 9.

Circumstances no ways belonging to the *Fact*; a Fault from which the Law of *Moses* is entirely free. And this, as we said, is the *intrinsick* Valuation and Proportion of a Punishment.

XXXIV.
That a Punishment is to be alleviated out of regard to the Criminal, unless greater regard is to be had to others.

XXXIV. But that which induces Men to mitigate the Severity of Punishment which the Law allows of, is their Kindness for the Criminal, unless the *juster* Love they have to many Persons move them to the contrary by some *extrinsick* Reason, which is sometimes the great *Danger* they are in from the *Offender*, but commonly the *Necessity* of making him a *publick Example*. Which *Necessity* usually arises when there are some *general* Encouragements to *Vice*, that cannot be repressed without sharp Remedies. Now the chief Encouragements are *Custom* and the *easiness* of committing the Offence.

XXXV.
How the easiness of offending inclines to Punishment, and how the Custom of offending either excites us to punish or dissuades us from punishing.

XXXV. Upon account of this *easiness* the Law of God given to the *Jews* punishes (e) *Theft* committed in a *Field* more severely than that which is committed in a *House*, *Exod.* xxii. 8, 9. *Justin* says of the *Scythians*, *No Crime with them was more heinous than Theft*; for to them who had neither *Houses* nor *Inclosures* for their *Herd*s and *Flocks*, what *Security* could there be, if stealing was allow'd of? Like to which is that in *Aristotle's* Problems, Section 29. *The Law-giver not thinking the Owners secure in the Custody of their Goods* (f) *in those Places*, appointed them the Law for a *Keeper*. The *Custom* of any *Fact*, though it somewhat takes off from the Crime

(e) *Theft committed in a Field more severely than that which is committed in a House.* See *Maimonides* Director 3. 41. *Cicero* pro *Sexto Roscio Amerino*, *Those Crimes deserve the greatest Punishment, which are most difficultly guarded against.*

(f) *In those Places.* At *Baths*. At *Athens* a *Bath Thief* was punished with *Death*, if what he stole was valued at more than ten *Croats*. *Demosthenes contra Timocratem*. Add l. 1. D. de *furibus balnearibus*.

(it was not without Reason, says Pliny, that he pardoned him for a Fact which was indeed forbidden, but yet commonly committed) yet in some respect it requires a more rigorous Punishment, because as Saturninus says, *When Offenders grow too numerous, there is a Necessity for Exemplary Punishment.* But in passing of Judgments Clemency, in making of Laws Severity, ought to take Place, due Regard being still had to the Time when Laws or Judgments are made. For the Benefit arising from Punishments respects the whole Community, for whose sakes Laws are made; but Offences respect particular Persons, being greater in some than in others.

XXXVI. 1. Now what we said, that where there are not great and urgent Reasons to the contrary, we ought to be ready rather to mitigate the Punishment, makes up the other part of Clemency. For the former consisted, we told you, in the absolute Remission of the Punishment: Because it is difficult to find the just Balance, says Seneca, therefore let the Inequality be on the milder side. And in another place, If it can be done safely, let the Punishment be quite remitted; if not, let it be moderated. And in Diodorus Siculus, an Egyptian King is commended for inflicting (g) less Punishments than the Crimes deserved. Capitolinus says of Marcus Antoninus, That his Custom was to award to all Crimes a less Punishment than what by the Laws they used to be punished with. Ifaüs the Orator said, that Laws ought to be made severe, but (h) that the Punishments should

XXXVI.
The use
of Clemency in
mitigating
Punishments.

K k 3

be

(g) *Less Punishments than the Crimes deserved*] Justin. 2, writing to the Huns, *Poenariorum lites* &c. 'Tis the Custom of the Romans not to render Punishments equal to the Demerits of the Offender.

(h) *That the Punishments should be gentler than the Laws require*] This was what the Emperor Henry design'd by the Symbol of a Pomegranate with this Motto *Subacere*, something sharp. And a certain King in Cassiodore 11. 40, expresses himself thus. *Dei ira est rigorensi Just when in Danger, when that is over we always pardon.*

be gentler than the Laws require. And it is the Advice of *Isocrates*, That Punishments be inflicted below the Degree of the Offence.

2. (i) *St. Austin* gives Count *Marcellinus*, in the execution of his Office, this Council: *I am in a great Concern, lest perhaps your Highness should think that Criminals are to be punished according to the utmost Severity of the Law, that their Sufferings may be equal to their Crimes: And therefore in this Letter of mine I beseech you, by the Faith you profess in Christ, and by the Mercy of our Lord himself, that you do it not, nor permit it to be done.* The same Author has likewise this Passage; *So terrible is the Threatning of Divine Judgment, even to the very Revengers of Crimes themselves, and who are not moved to this Office by any Provocation of their own, but are only the Executors of the Laws, and the Revengers not of their own, but other Mens Injuries, as Judges ought to be, to the end they might think that the Mercy of God is necessary on account of their own Sins, and that they might not look upon it as a breach of their Duty, if they shew any Clemency to those over whom they have the Power of Life and Death.*

XXXVII. What the Hebrews and the Romans had regard to in Punishments, may be referr'd to the Places above mention'd.

XXXVII. We hope we have omitted nothing that is of any great Moment towards the understanding this difficult and obscure Subject: For the four Things which (k) *Maimonides* says are chiefly regarded in Punishments, viz. the Greatness of the Offence, that is, of the Damage, the Frequency of such Offences, the Vehemency of the Desire,

(i) *St. Austin*.] In his 159th Epistle, which is quoted c. *circumcelliones*, *Caus. xiii. quest. v.* See, if you please, *Macedonius's* Letter to the same *St. Austin*, and *St. Austin's* Answer to it, n. 53 and 54. Add to this what there is of *Theodosius Junior* in Excerpt. *Johann. Antiochen.* out of *Peiresius's* MSS. *Macedonius ad Augustinum*, 'Tis the Business and Duty of a Priest to intercede for the Guilty.

(k) *Maimonides*.] l. 3. direct. c. 41. compare with this c. *sicut dignum de homicidio voluntario vel casuali*.

Desire, and the *Easiness* of committing the Offence, we have referred to their proper Places; as also the *seven Things* about Punishments considered by *Saturninus*, though very confusedly. For as to what relates to the *Person* of the Offender, that Consideration principally belongs to the *Capacity* of judging, and as to the *Person* who suffers the Injury, this conduces somewhat towards his estimating the *Greatness* of the Fault. (1) The Place where the Injury was done usually adds some peculiar *Aggravation* to the Crime, or is considered under the *Facility* of committing it. The Circumstance of *Time*, as it is *long* or *short*, so it *encreases* or *diminishes* the Freedom of judging, and sometimes helps to shew the *Depravity* of the Mind. The *Quality* of the Offence is partly referred to the several kinds of *Passion*, partly to the *Reason* which ought to restrain a Man from *Passion*. The *Event*, to the Causes restraining.

XXXVIII. That the Desire of inflicting Punishment is often the Occasion of War, we have both shewn above, and 'tis also what *Histories* every where inform us: And this Occasion of War is generally joined with the *Reparation* of some Damage, when the same Fact was both *vitious* in it self, and likewise *injurious* to others; from which two Qualities there arise two different Obligations.

XXXVIII.
Of War
made for
the exacting
of Punish-
ments.

K k 4

(1) The Place where the Injury was done usually adds some peculiar Aggravation to the Crime.] Philo l. i. de legibus specialibus, & τὰς οὐκ ἐν τοῖς δέοις. For it is not the same thing whether you strike your Father or a Stranger, whether you speak ill of your Prince or any private Person, whether you do what you ought not to do in a Prophane or a Sacred Place nor whether it be on a Festival, or in a Solemn Assembly or at a Publick Sacrifice. Agreeable to this is what *Ulpian* produces out of *Labeo*, l. prætor edixit at the end of D. de injuriis, As to the Person the Injury is the more heinous, when 'tis done to a Magistrate, a Parent or a Patron; as to the Time, when at a Public Shew, and in every Body's Sight. For he says that there's a great deal of Difference between an Injury committed in the view of the Roman People, and the same committed alone and in Solitude.

ons. Now that *Wars* are not to be entred into upon Account of every Offence is sufficiently clear; for indeed, even the Laws themselves do not exercise their *Vindictive* Power upon all Offences, though they may safely do it, as hurting none thereby but those who hurt others. *Sopater* rightly observes, what we have likewise already mentioned, that *smaller* and *common* Offences ought to be *connived at*, not *punished*.

XXXIX.
Whether a
War on the
account of
Offences just
begun, is
lawful; ex-
plain'd by a
Distinction.

XXXIX. 1. But what was said by *Cato* in his Oration for the *Rhodians*, that it is not reasonable a Man shou'd suffer Punishment upon account of having had an *Intention* to do ill, was indeed in that particular Case not observed *amiss*, because they could produce no Decree of the *Rhodians* for declaring War against the *Romans*, but had only some little Conjectures of a *wavering* and *uncertain* Design that way, yet this must not be received as a *general* Maxim. For the *Intention* of the *Will*, when it has proceeded to *external* Actions, (*internal* Actions being, as we have said before, *free from Human Punishment*) is universally a sufficient ground for Punishment. Crimes, says (m) *Seneca* the Father in his *Controversies*, are punished, even though not put in *Execution*. And, who would fain do an *Injury*, has done it already, says the other *Seneca*. Not only the actual *Accomplishment*, (o) but the very

De Ira.
lib. 3.

(m) *Seneca the Father.*] Excerpt. 4. 7.

(n) *Says the other Seneca.*] He's a *Rogue*, even before he defiles his Hands with Theft or Blood; because he's certainly arm'd for Murder, and comes with an *Intention* to rob and kill. *Philo* in his first Book de *specialibus legibus*, ἀνδραποδῆς ὁ καὶ φονεὺς &c. Not only those who actually take away a Man's Life are to be reputed Murderers, but those who by every Method either openly or in private attempt it, tho' they have not as yet accomplish'd the Villany.

(o) *The very contriving of Mischief is punish'd by the Laws.*] *Valerius Maximus* speaking of *Cn. Sergius Silla*, who was cast on the Ac-

count

Contriving of Mischief is punish'd by the Laws, said Cicero in his Defence of Milo. It was Perian- der's Saying, Punish, not only Offenders, but such as design to offend. So the Romans thought they had just Occasion for entering into a War against King Perseus, unless he wou'd make Satisfaction for designing Hostilities against them, as having for that purpose provided himself with Arms, Men, and a Fleet. And this very thing is rightly ob- served in Livy in the Speech of the Rhodians; No Customs or Laws of any State in the World punish a Man with Death, if he only willed the Destruction of his Enemy, without contributing any thing towards it.

Livius lib. 42.

2. But neither is every malicious *Intention*, tho' already declared by some open Act, a sufficient ground for *Punishment*: For if all Offences, though actually committed, are not punished, much less those that are only thought of and designed. What Cicero says does in many cases take place, *I do not know whether it be not sufficient for him who gave the Provocation to repent of his Injury. In the Jewish Law there is nothing particular for most of the Offences which one has begun against Piety, nor even against the Life of a Man if in the heat of Passion; because it is easie to mistake in Divine Matters, as being Things that are in the Dark with respect to us; and a sudden Transport of Anger may have a reasonable Plea for Pardon.*

3. But yet for any one to attempt the Invasion of the *Marriage Bed* when there was so great a Choice of *Matches*, or in such an equal Division of Possessions to go about by *fraudulent Methods* to

count of some Money he had promis'd to a certain good Woman, *Was not his Fact but his Design that was then called in Question, his Intention to have injur'd her was a greater Damage than his not injuring her was an Advantage.*

to enrich one's self at another's Loss, was a thing by no means to be suffered. For that Law in the Decalogue, *Thou shalt not covet*, (though, if you look to the Scope of the Law, that is, the πνευμαλικόν, or spirituality of it, it is of larger signification, (p) for the Law requires a perfect Purity of Mind in all) yet as to what relates to the External Precept, the ἐνσολὴν σαρκικὴν or Carnal Command, it refers to such Motions of the Mind as are discovered by open Acts, as is very evident from the Evangelist St. Mark, who expresses that same Precept by the Words, μὴ ἀποσερήσης, *Defraud not*, and that, when he had before mention'd, μὴ κλέψῃς, *Do not Steal*; and in this Sense the Hebrew Word and the Greek answering to it, are found both in Mich ii. 2. and several other Passages.

Cap. x. 19.

XL. Whether it be Lawful for Kings and States to make War upon such as violate the Law of Nature, tho' they have committed nothing against them or their Subjects; this explain'd, and the Opinion that would have Jurisdiction natural-ly Necessary towards punishing rejected.

4. And therefore Offences that are only begun are not to be revenged by Arms, unless in a Case of great Concorn, or that the Affair proceeded so far, that the Action has been already attended with some mischievous Consequences, though not those, as yet, which were intended, or at least with some extreme Hazard; that so it may appear, that we have recourse to this Method only, either to prevent some future Mischief, (of which we have treated above in the Chapter of Defence) or to vindicate a wounded Honour, or to obviate a pernicious Example.

XL. 1. We must also know, that Kings, and those who are invested with a Power equal to that of Kings, have a Right to exact Punishments, not only for Injuries committed against themselves or their Subjects, but likewise for those which do not peculiarly

(p) For the Law requires a perfect Purity of Mind in All.] St. Chrysostom has several things to this Purpose upon Rom. iii. 13. and upon Chap. 7.

Peculiarly concern them, but which are, in any Persons whatsoever, grievous *Violations* of the Law of Nature and Nations. For the *Liberty* of consulting the Benefit of *Human Society* by *Punishments*, which at first, as we have said, was in every particular Person, does now, since *Cities* and *Judicatories* have been instituted, reside in those who are possessed of the *Supreme Power*, and that properly not as they have an *Authority* over others, but as they are in *Subjection* to none. For as for others their *Subjection* has taken from them this *Right*. Nay, it is so much more *honourable* to *Revenge* other Peoples Injuries rather than their own, by as much as it is more to be feared lest out of a Sense of their own Sufferings, they either exceed the just Measure of *Punishment*, or at least prosecute their *Revenge* with *Malice*.

2. And upon this Account it is, that *Hercules* is so highly extolled by the Ancients (q) for having freed the Earth of *Antæus*, *Busiris*, *Diomedes*, and such like Tyrants, whose Countries, says *Seneca* of him, he pass'd over not with an ambitious Design of gaining them for himself, but for the sake of vindicating the Cause of the Oppressed; being, as *Lysias* shews, the Author of great Good to Mankind, by punishing the Unjust. *Diodorus Siculus* speaks thus of him, He made States happy, by purging out of them unjust Men and insolent Princes. In another place he says, He travelled over the World to punish the wickedness of Men. Of the same Person is that of *Dion Pruseensis*, He punished bad Men, and either destroy'd the Dominions of proud Tyrants, or transferred them upon

(q) For having freed the Earth.] And the Seas too, *Philo de legat. hecclius ἐκείνου γῆς &c.* Hercules clear'd both Sea and Land, undertaking Enterprizes Necessary and Advantageous to all the World, Enterprizes design'd purely for the Destruction of every Thing that was hurtful and pernicious in either Nature.

upon others. And for the general Care he took of all Mankind *Aristides* in his *Panathenaicum* says he deserved to be taken into the Number of the Gods. In like manner is *Theseus* commended for having destroy'd the Robbers *Sciron*, *Simis* and *Proustes*, and is therefore introduced by *Euripides* speaking thus of himself to his Suppliants :

My Aets of old have spread my Fame thro' Greece,
(r) *Where I the Scourge of Villanies am styl'd.*

L. v. c. 3. *Valerius Maximus* says of him, every Thing that was monstrous or wicked, he subdued by the Bravery of his Mind or the Strength of his Body.

3. For the same Reason we make no doubt, but War may be justly undertaken against those who are impious and ungrateful to their Parents, as were the *Sogdians* before *Alexander* taught them to reform their Brutality; against those (s) who eat human

Plutarch
de fortitud.
Alexand.

(r) *Where I the Scourge of Villanies am styl'd.* When the Herald says there,

Ἦ πατρὶς ἐν σ' ἔφουσεν ἀρχέσειν παῖνες;

Did you from your Father this Vigor gain,
Was't he, who made you thus a Match for all?

Theseus replies :

Ὅσοι γ' ὕβρισαι, χρυσὸν δ' ἔχουσιν καλὰ ζοῶν.

For all who are Injurious. But we ne'er
Molest the Good.

Plutarch in his Life; ἀπὸ πάντων τῶν ἑλλὰς δα δεινῶν τυραννῶν, he deliver'd Greece from some Terrible Tyrants. And again, δὲν αὐλῆς &c. without being any ways injur'd himself, to vindicate others and for their Security, he employ'd his Arms against the Wicked.

(s) *Who eat human Flesh.* Alexander reclaim'd the *Scythians* too from this.

man Flesh (t) from which Custom Hercules compelled the ancient Gauls to desist, as Diodorus relates; and against those who practice Pyrracy. If a Man, says Seneca, does not infest my Country, but is only vexatious to his own; though he is at a Distance from my Nation, yet if he disturbs his own; so great a Depravity of Mind has cut him off from human Society, and makes him to me and all the World a Foe. And St. Augustin, Such abominable Crimes do they allow of in their publick Decrees, that if any City upon Earth should injoin or had injoin'd the like, it ought to have been by the general Voice of Mankind laid in Ruins. For of such Barbarians, and rather Beasts than Men, may be fitly said what Aristotle spoke out of Prejudice concerning the Persians, who were indeed nothing worse than the Greeks: that War against such is natural; and as Isocrates said in his Panathenaic, the justest War is that which is undertaken against wild Rapacious Beasts, and next to it is that against Men who are like Beasts.

vii. De Beneficiis.

L. v. Civ. Dei.

4. And so far we follow the Opinion of Innocentius and others, who hold that War is lawful against

(t) From which Custom Hercules compell'd the ancient Gauls to desist. See an Account in Dionysius Halicarnassensis, how Hercules destroy'd this and many other inhuman Customs, making no Distinction in his Favours between Greeks and Barbarians. Pliny xxx. 1. cries up the no less Merit of the Romans for the Good they did Mankind; It cannot be sufficiently express'd, says he, how much is owing to the Romans, for destroying those Monsters, who made it a Point of Religion to murder a Man, and thought it very much for their Health to eat him when they had done. Add to this what we shall say by and by in this very Chapter, Sect. xlvii. So Justinian commanded the Princes of the Abasgi not to castrate their Subjects Children. Procopius mentions this Affair. Gothic. iv. and Zouarus in his Life of Leo Isaurus. And the Incha's Kings of Peru, compell'd by Force of Arms the Neighbouring Nations, whom they could not reclaim by their Admonitions, to abstain from Incest, Sodomy, eating of Man's Flesh, and such like Abominable Practices and by this Means obtain'd an Empire, of all we read of, excepting their Religion, the Justest.

against those (u) who offend against *Nature*; which is contrary to the Opinion of *Victoria*, *Vasquez*, *Azorius*, *Molina* and others, who seem to require towards making a *War* just, that he who undertakes it be injured in *himself* or in his *State*, or that he has some *Jurisdiction* over the Person against whom the *War* is made. For they assert that the *Power* of *punishing* is properly an Effect of *Civil Jurisdiction*; whereas our Opinion is, that it proceeds from the *Law of Nature*, concerning which Point we said something in the beginning of the *first Book*. And certainly if the Opinion of those from whom we differ be admitted, the Consequence is, that one *Enemy* shall have no *Right* to *punish* another, even after the *War* is begun, upon the Account of any Cause *not punishable*; which yet is a *Right* that most allow of, and the Practice of all *Nations* confirms, and that not only *after* the *Enemy* is *subdued*, but likewise *during* the *War*; not on Account of any *Civil Jurisdiction*, but of that *Natural Right* which was both *before* the Foundation of *Governments*, and even is now still in Force in those Places, where Men live in *Tribes* or *Families*, and are not incorporated into *Cities*.

XLI. The Law of Nature is to be distinguished from Civil Customs generally received :

XLI. But here some *Precautions* are to be observed; the *first* of which is, that *Civil Customs*, though received among many *Nations* not without good Reason, be not mistaken for the *Law of Nature*; much of which kind were those which caused the Separation between the *Persians* and *Greeks*, to which may be properly referred what is said by *Plutarch*, *They disguise their Ambition and Covetousness, under a Pretence of rendering barbarous Nations more polite in their Manners.*

XLII. The

(u) Who offend against Nature.] See *Josephus Acosta* de procuranda Indorum salute, l. 11. c. 4.

XLII. The *second* is, that among Things *forbidden by Nature*, we do not inconsiderately reckon those of which we have not sufficient Evidence that they are such, but that are rather *repugnant* to the *Voluntary Law* of God; under which Class perhaps may be ranked (x) the Sin of *single Fornication*, some of the Familiarities that are called *Incest*, and likewise *Usury*.

XLII. And from the voluntary Divine Law not known to all Nations.

XLIII. 1. The *third* is, that we carefully distinguish between *general Principles*, such as this, *That we ought to live honestly*, that is, according to *Right Reason*, as also some that come very near to them, and are so manifest, that they can admit of no doubt, as for Instance, *That we ought not to take that which belongs to another*; and between the *Inferences* drawn from them, of which some are obvious enough, as, that, *admitting Matrimony*, (y) *Adultery ought not to be allowed of*; others again are more hardly deduced, as, that *That Revenge is Criminal which has nothing in view but another's Sufferings*. It is here almost as it is in *Mathematicks*, where some Things are *first Notions*, or next to *first Notions*; some are *Demonstrations* which are immediately both understood and assented to, some again are *true*, but not *evident* to all.

XLIII. What is manifest in the Law of Nature is to be distinguished from that which is not so.

2. As therefore with Respect to the *Civil Laws*, the *Ignorance* of them, or of their true Meaning excuses a Fact, so (z) with Respect to the *Laws of Nature*

Mat. x. 15. Luc. xii. 47. 48.

(x) *The Sin of single Fornication.*] Asterius Bishop of Amasea, *oï τοίς τῷ βίῳ &c.* Those who regard only the Legislators of this Life leave the Liberty of Whoredom without a Punishment. Add to this a Passage of St. Jerom to Oceanus cited by us, at Chap. v. Sect. 9.

(y) *Adultery ought not to be allow'd of*] Philo in his Life of Joseph says, that *Adulteries* are ev'ry where punish'd; and Ulpian, that *Adultery* is by Nature Base and Criminal; 1. *Probrum D. de verborum significatione*. Lactantius in his Epitome; To violate another Man's Bed, is by the universal Law of Nations condemn'd.

(z) *With Respect to the Laws of Nature* it is Reasonable that they should

Nature it is Reasonable, that they should be excused, whom either the *Weakness* of their Judgment, or their *Ill Education* have hinder'd from the Knowledge of those Laws. For as the *Ignorance* of the Law, if it is *invincible*, takes away Sin, so when attended even with *Negligence* it lessens Sin. And therefore those *Barbarians*, who offend in these Matters by Reason of their *bad Education*, *Aristotle* compares to such as have their Appetites vitiated by some Distemper. *Plutarch* says, *There are some Distempers of the Mind that degrade a Man below his Natural Condition.*

Nicom. vii.

3. Lastly, this must be added, which I shall now mention once for all, that those *Wars* which are undertaken for the exacting of *Punishment* are suspected to be *unjust*, unless the *Crimes* be very *heinous* and *manifest*, or there be at the same Time a *Concurrence* of some other Cause. Perhaps it was not without Truth, that *Mithridates* said of the *Romans*, *It was not the Crimes of Princes, but their Power and Majesty that they prosecuted.*

Justin 38.

XLIV.
Whether
War may
be made for
Offences
against God
only.

XLIV. 1. The Order of our Discourse has now brought us to consider those *Offences* that are committed against God. For the Question is, *Whether for the revenging of these a War may be undertaken*, which *Covarruvias* has treated of at large. But he, sway'd by the Authority of others, thinks there is no Power to punish where there is not a *Jurisdiction* properly so called; which Opinion we rejected before. Whence it follows, that as in *Ecclesiastical Affairs*, *Bishops* are said in some Measure τὴν καθολικὴν ἐκκλησίαν, that is,

(a) to

should be excused, whom either the *Weakness* of their Judgment, or their *Ill Education* have hinder'd.] St. *Jerome* against *Jovinian* ii. Every Nation thinks that to be the Law of Nature, which it self has received.

(a) to have taken upon themselves the Care of the Universal Church; so Kings, besides the Charge of their particular *Dominions*, have upon them the Care of *human Society* in general. A better Argument for the Opinion, that such *Wars* are *unjust*, is this, that *God* alone is sufficient to Revenge the Crimes committed against himself, whence the Sayings, *The Injuries of the Gods are left to the Care of the Gods*, and *Perjury has God for its Revenger*.

2. But certainly the same may said of *other Offences*. For no doubt of it, *God* is sufficient to punish them likewise, and yet these are justly punished by *Men*, as there is none who denies. Some will further insist upon this Argument and allege, that *other Offences* are punished by *Men*, as other *Men* are thereby hurt or endangered; in reply to which we must observe, that not only those *Offences* are punished by *Men* which directly hurt others, but those too which do it but *consequently*, as *Self-Murder*, for Instance, *Lying with Beasts*, and some others.

3. Now *Religion*, tho' of it self it is able to procure us the Favour of *God*, yet it has likewise its peculiar Effects and those very great upon *human Society*. Nor is it undeservedly called by *Plato* the *Bulwark of Power*, and the *Band of Laws and good Manners*. *Plutarch* in like manner calls it, *The Cement of all Society, and the Foundation of the Legislative*

VOL. II.

L I

gislative

(a) To have taken upon themselves the Care of the Universal Church.] This Passage is in the *Constitutions* that bear the Name of *St. Clement*, *St. Cyprian*, *Epist. xxx*. It becomes us all to watch over the Body of the whole Church, the Members of which are distributed through every Province. And in his *Treatise de Unitate Ecclesie*; there is but one *Episcopacy*, of which each holds his own *Respective* entire. Instances of this general Cure you have frequently in *Cyprian*, and especially in his Excellent *lxviii*th *Epistle*. Add *Chrysostom* in *laudibus S. Eusebii*.

gislative Power. And according to Philo, (b) *The Worship of one God, is the most effectual Charm and indissoluble Tie of Kindness and Friendship.* Irreligion is attended with all the contrary Effects:

Sil. Ital.

— 'Twas (c) *Ignorance of God*
That first plung'd wretched Men in Wickedness.

vii. Pol.

De creat.
magistr.

Every false Persuasion, says Plutarch, in Matters of Divinity is pernicious, and if accompanied with Perturbation of Mind it is so in the highest Degree. In Jamblichus we find this Sentence of Pythagoras, *The Knowledge of God is Virtue, and Wisdom, and perfect Happiness.* Hence Chrysippus called Law, the Queen over all Affairs Divine and Human; and according to Aristotle, (d) among publick Cares, the first and chiefest is that which concerns Divine Things. So the Romans defined Jurisprudence to be the Knowledge of Things Divine and Human; and Philo makes the whole Business

(b) *The Worship of one God.*] And in his Book de fortitudine αἴτιον τῆς ὁμονοίας &c. The Belief of one God is the sublimest and the most prevalent cause of Concord, from which as from an Inexhaustible Fountain flow the strictest Union and Friendship. And Josephus in his Book against Appion; τὸ ὁμοῦ νοεῖν &c. To have one and the same Opinion about God, and not to differ from each other in Customs and Methods of living, creates in Mens Behaviour the most beautiful Agreement in the World.

(c) *Ignorance of God.*] So Josephus too, in his second Book against Appion, gives the following Reasons why some States were ill manag'd; τὸ μὴτε τὴν ἀληθεῖαν &c. Because the Founders of the Laws did not at first consider the true Nature of God nor regarded, much as they might have done, that exquisite Knowledge, making the Model of their future Government and Constitution. See there also some Excellent Things that come immediately after.

(d) *Among publick Cares the first and chiefest is that which concerns Divine Things.*] To the Knowledge of which Justin Martyr inviting the Emperors adds; βασιλεὺς δὲ καὶ ἡ πόλις ἵπποτον εἶναι, This would be indeed an Employment worthy of a King. Add to this what Covarruvias has in c. Possessor. Sect. 10.

of Kingly Government, to consist in taking Care of private, and publick, and sacred Things.

4. Now all this must be considered as holding true, not in one State only, as when Cyrus says in Xenophon, that Subjects the more they fear God, the more loyal and obedient they will be, but likewise in the general Society of Mankind. Take away Piety, says Cicero, and you destroy at the same Time Fidelity, human Society, and the most excellent Virtue Justice. And in another Place: to know what is the Deity, what the Counsel, what the Will of the Supreme Governour and Lord of the World, infallibly produces Justice. And of this, one evident Argument is, that Epicurus, after he had taken away Divine Providence (e) left nothing to Justice but an empty Name, to which as he allowed no other Original but that of the Agreement of Men, so neither would he have it continue longer than it made for the common Profit; and thought, that the only Reason that ought to restrain Men from injuring others, should be the Fear of Punishment. His very Words to this purpose, which are very remarkable, are extant in Diogenes Laertius.

Cyri instit.
lib. 8.

Lib. 1. de
Nat. Deor.

De fin. iv.

5. Aristotle likewise observed this Connexion, when in his vth de repub. Chap. xi. speaking of a King he says, For the People will less fear ill Treatment from a Prince whom they believe to be Religious. And Galen (in his ixth Book de placitis Hippocratis & Platonis) after he had said, that there are many Questions concerning the World and the Divine Nature which are of no use in Morality, owns that the Enquiry about Providence is of

L 1 2.

the

(e) Left nothing to Justice but the empty Name. Seneca. Epist. xcvii. Let us not agree with Epicurus, when he advances that nothing is by Nature Just, and that Crimes are only to be avoided, because we cannot avoid our own Fears.

the greatest Use toward the Practice both of private and publick Virtues. The same was likewise observed by Homer, who in the sixth and ninth Book of his *Odysses*, to brutish and unjust Men opposes those who are of a religious Disposition. So Justin from Tragus Pompeius commends (f) the Justice of the Ancient Jews, as being mixt with Religion; as does also Strabo, saying, *They were People who were really Just and Religious. If it is*

Inst. L. 5. *Piety, says Lactantius, to know God, the Sum of which Knowledge is, that you worship him, he must be altogether ignorant of Justice, who does not hold to the Religion of God. For how can he know Justice, who is ignorant of the Source from whence it is derived? And the same Author elsewhere, Justice properly belongs to Religion.*

De lra. Dei.

6. Now the Usefulness of Religion is even greater in that greater Society of Mankind in general, than in any particular Civil Society; for in a Civil State it is partly supply'd by the Laws and the easy Execution of the Laws; whereas on the contrary, in that great Community the Execution of Law is very difficult, as being to be performed no other way than by Force of Arms, and the Laws are very few; which themselves moreover derive their Sacredness chiefly from the Fear of a Deity; from whence those who offend against the Law of Nations, are every where said to violate the Law of God. It was not amiss therefore, that the Emperors asserted, that the Corruption of Religion was an Injury to all the World.

L. 4 C. de hereticis.

XLV. 1. To

(f) The Justice of the Ancient Jews, as being mixt with Religion. Philo in his Life of Abraham, & Justin's words; &c. To be Religious and to be Good-natur'd, are Qualities of the very same kind, and where-ever you mixt with Piety towards God, you'll always find Justice towards Man.

XLV. 1. To take a closer View of the whole Matter, we must observe, that the *true Religion*, which is the *same* in all Ages, is built upon four fundamental Principles; of which the *first* is, that *There is a God, and he but one*: The *second*, that *God is not any of those Things we see, but something more sublime than them*: The *third*, that *God takes Care of humane Affairs, and judges 'em with the strictest Equity*: The *fourth*, that *the same God is the Creator of all Things but himself*. These four are express'd in so many Commandments of the *Decalogue*.

XLV. Which are the most common Notions of a God, and how they are shewn in the first Precepts of the Decalogue.

2. For in the *first* is plainly deliver'd the *Unity of God*; in the *second* his *invisible Nature*, by Reason of which any *Image* of him is forbid to be made, *Deut. iv. 12.* as (g) *Antisthenes* also said, *He is not seen with the Eyes, there is nothing to which he bears any Resemblance, so that no Man can know him by an Effigies*; (h) And *Philo*, *It is a prophane Thing to represent the Image of him that is invisible by any Picture or Statue*. *Diodorus Siculus* speaking of *Moses*, says (i) *He made no Similitude, because he did not believe God to be of Humane Shape*. The *Jews*, says *Tacitus*, conceive *God* in their *Minds* only, and him as *but one*; esteeming them *profane* who frame *Images of Gods* out of *perishable Matter* after the *Likeness of Men*. And *Plutarch* assigns this Reason for (k) *Numa's* removing *Images* out of *Temples*,

L 1 3

Because

(g) *Antisthenes*] Commended by *Clemens Alexandrinus*. *Seneca Nat. quest. l. vii. c. 30.* seems to have borrow'd from him the following Passage: *He, who manages these Things, who created all this, and cast the Universe about him, and is himself the greater and better Part of his Work, escapes our Eyes, and is in our Thoughts only to be seen.*

(h) And *Philo*.] 'Tis King *Agrippa* who says this in *Philo*.

(i) *He made no Similitude*] *Dion. l. xxxvii. 28. ἀγαλμα* &c. *Nor had they any Image at Jerusalem; thinking that God was neither visible, nor to be express'd by Words.* See *Strabo* too l. xvi.

(k) *Numa's*.] Of this Institution of *Numa*, see also *Dionysius Halicarnassensis*.

Because God cannot be conceived but by the Mind only. In the Third Commandment is imply'd God's Knowledge and Care of the Affairs, and even of the Thoughts of Men: For this is the Foundation of an Oath. In the Fourth is delivered the Origin of the whole World from God its Author, (1) in Memory of which the Sabbath was instituted of old, and that indeed to be observed with a peculiar Sanctity above all other Rites. For the Breach of any other ceremonial Observations was by the Law left to be punished at the Discretion of the Judge: But of This the Punishment was capital; because the Violation of the Sabbath did from the very Manner of its Institution imply a Denial of God's Creation of the World. Now the very Notion of God's having created the World gives a tacit Indication of his Goodness, and Wisdom, and Eternity, and Power.

3. And from these *speculative* Notions follow the *Practical*, as that God is to be *honoured*, loved, worshipped, and obeyed. Therefore said *Aristotle*, he
 Top. I. 9. who denies that God is to be honoured or his Parents loved, must be reduc'd to better Reason not
 Top. II. 4. by *Argument* but by *Punishment*: And again, that in different Places different Notions as to what is *Virtue* and *Honesty* prevail, but in this of *honouring God* the Agreement is *universal*. Now the *Truth* of these *speculative* Notions, as we called them, may, no doubt it, be *demonstrated* by Arguments drawn from *Nature*, amongst which This is one of the *strongest*, That it is evident to *Sense* that some Things are *made* or have a *Beginning*;

(1) *In Memory of which the Sabbath was instituted of old.* The Author of the Answers to the Orthodox Christians, at the lxxixth Question, *ἡ ἐν οὐρανῷ ἔστι θεός.* And therefore, that the Memory of the World's Creation might be preserv'd among Men, God, in Holy Writ, commanded a greater Honour to be paid to the Seventh Number, than to any of the rest. See also what goes before there.

ning; now the *Things that are made* do necessarily lead us to the *Knowledge* of some Thing that was *never made*. But because this *Reason* and others like it are not understood by all, it is sufficient that in all *Ages*, and through all *Countries*, a very few excepted, these *Notions* have been entertain'd both by *those* who were too gross of Understanding to be conceived *willing* to impose upon others, and by *those* who were too wise to be imposed upon themselves: (m) which *general Consent*, in so great a *Variety* both of *Laws* and *Opinions* about other *Matters*, sufficiently shews that this *Tradition* has been derived to us from the very *first Men* in the *World*, and has never been solidly *confuted*, which even of it self is enough to make it be *believed*.

4. Agreeable to what we have now advanced concerning *God*, is the *Testimony* of *Dion Pruseensis*, when he says that the *Persuasion* of a *God* is partly *born with us*, as being gained by *Arguments* of our own *Reason*, and partly *acquired by Tradition*. *Plutarch* calls the same an *ancient Opinion*, which for its *Certainty* is equal to any *Conviction* that

L. 1 4

can

(m) Which general Consent,] *Tertullian* against *Marcion*. The *Knowledge* of a *God* is a *Gift*, the *Soul* is from its first *Original* endued with. And *Diodorus Siculus* says, φυσικὴ ἐνδύσεια, That *Religion* is natural. *Philo* de *Unius Imperio*, ἐστὶν τεχνικὸν, ἔργον &c. No-thing that's nice and artificial comes by *Chance*: But the *World* is an admirable *Piece of Workmanship*, and plainly demonstrates the *Skill* of the best, and most masterly *Hand*. 'Tis thus that we discover the *Being* of a *God*. *Tertullian* against *Marcion*. 1. We maintain, That *God* must be first known by *Nature*, and then by *Doctrine*: We know him by *Nature*, from his *Works*: By *Doctrine*, from the *Preaching* of his *Gospel*. *St. Cyprian*, de *Idolorum Vanitate*: This is the *Height of Wickedness*, not to acknowledge Him, whom thou canst not be ignorant of. *Julian* to *Heraclitus*: πάντες ἀδελφοί &c. We are all, without being taught so, persuaded that there is a *God*, and to Him I think we ought to have *Regard*, to Him to direct all our *Designs*, being in our *Souls* as much dispos'd towards this *Object*, as, I believe, our *Eyes* are to the *Light*.

De cœlo
Lib. 3.

XLVI.
That those
who first
violate
these Noti-
ons are pu-
nishable.

can be brought or imagin'd, it being the common Foundation of Piety. And Aristotle says, All Men are persuaded that there are Gods. Plato says something to the same Purpose in his Tenth Book of Laws.

XLVI. 1. And therefore those Men are not entirely blameless, who, though they are too stupid to find out or comprehend the Arguments that serve to demonstrate these Notions, do yet impudently reject them, since they both direct us to the Knowledge of what is just and honest, and besides, the contrary Opinion has not Arguments to support it. But because we are here discoursing of Punishments, and those such Punishments as relate to Men, we must not confound the Notions themselves with the Manner and Measure of our dissenting from them. That there is a Deity (one or more I shall not now determine) and that This Deity has the Care of Humane Affairs, are Notions universally receiv'd, and are absolutely necessary to the Establishment of any Religion, whether True or False. He that cometh to God (that is, he who has any Religion, for Religion by the Hebrews is termed, a coming to God) must believe that he is, and that he is a Rewarder of them that diligently seek him.

Heb. xi. 6.

2. Thus Cicero too : There still are and always have been some Philosophers, who thought the Gods had no Regard at all to Humane Affairs; whose Opinion, if it were true, what Piety could there be, what Holiness, what Religion? For all these Virtues are purely and solely owing to the Majesty of the immortal Gods, upon a Principle, that they observe our Actions, and do reward Mankind accordingly. 'Tis the highest Instance, says Epictetus, of our Devotion towards the Gods to have Right Conceptions of them, as of self-existent Beings that superintend and dispose of all Things with strictest Righteousness and unbyass'd Justice. Aelian remarks, that none, even of People the most im-
polite

life and unciviliz'd, did ever sink so low as to en-
 certain and profess *Atheism*, but that (n) a *Divi-*
nity and a *Providence* were allowed and affirmed by
 all. *Plutarch*, in his Book of *Common Ideas*, de-
 clares that if we take away a *Providence*, we quite de-
 stroy the *Notion* of a God. For God must be conceiv'd
 and understood to be, not only an immortal and an hap-
 py, but also an affectionate, a careful, and a profit-
 able Being. Nor, as *Lactantius*, can there any Honour
 be due to God, if he does nothing for him who wor-
 ships him; nor any Fear, if he is not angry with him
 who worships him not. And indeed 'tis all one, if
 we regard the *Moral Effect* of such *Notions*, whe-
 ther we deny a God, or deny he is concern'd in the
 Management of *Humane Affairs*.

3. Wherefore even out of meer *Necessity* is it,
 that these two *Notions* have for so many Ages been
 preserv'd (o) among all the People of the known
 World. And from hence *Pomponius* ascribes *De-*
votion towards God to the *Laws of Nations*: And
Socrates in *Xenophon* says, that to worship the Gods
 is a Law and Maxim that every where prevails:
 Which *Cicero*, both in his First Book of the Na-
 ture

(n) *A Divinity and a Providence.*] *Seneca* Epist. xcv. The first Ser-
 vice that we pay the Gods, is to believe their Existence; then to acknow-
 ledge their Majesty, and to own their Goodness, without which their
 Majesty would signify Nothing.

(o) *Amongst all the People of the known World.*] *Seneca* Epist. cxvii.
 That there are Gods, among other Arguments that might be urg'd to prove
 it, we from hence conclude because that such an Opinion is implanted in
 all Mankind: Nor is there any Nation so abandon'd, so averse from Laws
 and good Manners, as not to believe it. And in his 4th B. de *Benefi-*
ciis. ch. 4. Nor could all the World have conspir'd in so much Madness,
 as to address Deities who can neither hear their Prayers, nor give 'em
 any Assistance. Add to this, *Plat. Protagor*, and l. x. de *Legibus*, and
 some handsome Passages in *Jamblichus*, about the Beginning of his
 Treatise concerning the Mysteries of the Egyptians, where he says,
 'Tis as much the Property of a Man to know there is a God, as it
 is for a Horse to neigh.

ture of the Gods, and in his Second of *Invention*, does also assert. And *Dion of Prusa*, Oration *XLI*, calls it an *Opinion common to all Mankind*, both to Greeks and to Barbarians, necessary for, and naturally implanted in all who have the Use of Reason: And a little farther he styles it, a powerful and eternal Persuasion, which at all Times and in all Places was begun and is continu'd. *Xenophon*, in his *Feast*, says that both Greeks and Barbarians think and allow that all Things, whether Present or Future, are known to the Gods.

4. 'Tis my Judgment therefore that those, who first attempt to destroy these Universal Notions ought, on the Account of *Humane Society* in general which they thus without any just Grounds insult and injure, (p) to be severely punish'd, as in all well-govern'd Communities has been usual; 'tis what we read was practis'd towards *Diagoras* of *Melos* and towards the *Epicureans* who were expell'd and banish'd all Cities that had any Regularity and good Manners amongst 'em. *Himerius* the Lawyer, in his Pleadings against *Epicurus*: Do you suffer then for your Opinion? No; but for your Impiety; you may think as you please, but you shall not have the Liberty of propagating your Irreligion.

XLVII.

But not others which as shewn by an Argument drawn from the Mosaick Law.

XLVII. 1. Other general Notions, as that there is but one God, that no Object of our Sight is God, not the World, not the Heavens, not the Sun, nor the Air; that the World is not eternal, nor its compound Matter, but that it was created by God, have not the same Degrees of Evidence as the former, and therefore the Knowledge of them in some Nations through the Degeneracy of the Times we find

(p) To be severely punish'd.] *Morsus* the Lydian having taken the City of *Crambus* by Siege, drowned all the Inhabitants, *ὅσων ἀθεῖς*, as *Atheists*, because they neither acknowledg'd nor worshipp'd any God. *Nicolaus Damascenus*, in *Excerpt. Peires*.

find totally erased; to this did contribute the *Remisness* of the *Laws*, which made but little Provision for them, because not deemed so absolutely necessary, but that without them some sort of *Religion* might be kept up.

2. The *Law of God*, tho' delivered to a Nation, which by the concurrent Proof of *Prophecies* and *Miracles*, either seen or transmitted to them by incontestable Authority, was infallibly assured of the *Truth* of these Notions, tho' it utterly detested the Adoration of *false Gods*, did not Sentence to *Death* every Offender in that case, but such only whose Transgression was attended with some particular Circumstance, that might be of destructive Consequence; as for instance, one who was the *Ring-leader*, and chief in seducing others, *Deut. xiii. 16.* or a *City* that began to serve Gods unknown before, *Deut. xii. 23.* or him who pay'd Divine Honour to any of the *Host of Heaven*, hereby cancelling the whole Law, and entirely relinquishing the Worship of the *True God*, *Deut. xvii. 2.* (which by *St. Paul* is interpreted $\lambda\alpha\lambda\acute{\iota}\pi\upsilon\epsilon\alpha\nu\ \tau\eta\ \kappa\tau\acute{\iota}\sigma\tau\iota\varsigma\ \omega\alpha\pi\epsilon\acute{\iota}\tau\alpha\iota$, to be. (q) worshipping the Creature, and not the Creator; for $\omega\alpha\pi\epsilon\acute{\iota}\tau\alpha\iota$ as well in this, as other places is to be understood in an *exclusive* Sense) which from *Job xxxi. 26, 27.* appears to have been a Crime liable to Punishment, even among the Descendants of *Esau*; or lastly, him who Sacrificed

(q) *Worshipping the Creature, and not the Creator.*] *Philo* upon the Decalogue speaking of such sort of Folks, $\epsilon\iota\sigma\iota\ \delta\epsilon\ \sigma\omicron\iota\ \alpha\gamma\ \omega\epsilon\sigma\omicron\upsilon\tau\epsilon\varsigma\ \beta\alpha\lambda\lambda\alpha\sigma\iota\nu$ &c. But there are some whose Impiety goes farther still, who do not so much make an Equality between God and his Works, but give all the Honour to these alone; so far from letting him have a share of it, that they don't vouchsafe that Universal Being a bare Memorial; these Wretches are unmindful of him whom alone they ought to remember, industriously contriving a voluntary Forgetfulness. So *Maimonides* expounds the Passage in *Deuteronomy*, Direct. 3, 41.

fixed his Seed to *Moloch*, that is, to *Saturn*, Lev. xx. 2.

3. Nor did God himself think the *Canaanites*, and their neighbouring Nations, tho' laps'd to *Idolatry*, ripe for Punishment, 'till by an accumulation of other Crimes they had enhanc'd their Guilt, Gen. xv. 16. And in reference to the Worship of *false Gods* among other Gentiles, we read that *he winked at the times of their Ignorance*, Acts xvii. 30. It was a true Observation of *Philo*, that every Man thinks his own Religion the best; inasmuch as not by the Test of *Reason*, but *Affection*, he forms a Judgment of it. Parallel to which is that of *Cicero*, that no *Philosopher* approves of any Discipline but that of his own Sect; who likewise adds, that it is usual with Men to be immoveably prejudiced in favour of some Tenets, before they are in a capacity of distinguishing betwixt *Truth* and *Falshood*.

4. As then they are excusable, and certainly do not deserve *Human Punishment*, who having received no Laws from God, worship the Powers and Influences of the *Stars* or other *natural Beings*, either in *Images*, *Animals*, or any other *Objects*, or even the departed *Souls* of Men eminent for their *Virtues* and useful in their Generations, or other *Spiritual Substances*, especially if they were not themselves the *Inventers* of this *Worship*, (r) and therefore do not forsake the *Service* of the *true God*; so, on the other hand, those are not to be look'd upon as People pardonably ignorant and mistaken, but as *impious* and *perversly wicked*, who pay *Divine Honours* to *evil Spirits* under

(r) And therefore do not forsake the Service of the true God.] Thus the Jews admitted into the Temple the Sacrifices that were sent 'em by the Kings of Egypt, by *Augustus*, and by *Tiberius*. This is what both *Josephus* and *Philo* assert.

under the Notion of *such*, to the Names of *Vices*, or to *Men* infamous for *flagitious* Lives.

5. Of the same stamp are they likewise, who honour their *false Deities* with *Human* Sacrifices; to a Disuse of this detestable Rite the *Cartbaginians* were compelled by (s) *Darius* the *Persian* King and *Gelo* Governor of *Syracuse*, which Action of theirs gain'd 'em much Credit and Applause. We have an Account in *Plutarch*, that the *Romans* thought to have punished some *barbarous* People for making Victims of *Men*, but when to extenuate their Guilt they urged the *Antiquity* of this Custom, they were acquitted, but strictly enjoined to discontinue it for the future.

XLVIII. 1. But how shall we determine of that *War* which is brought against a Nation for no other Reason, but because they reject the Laws of *Christianity*, when propos'd unto them. I shall not here stand to enquire whether it be *such*, or after *such* a manner propounded, as it ought: But taking them *both* for granted, there are *two* things which occur observable. The *first* is, that the Truth of the *Christian* Religion, in those Particulars which are additional to the *Law of Nature*, cannot be sufficiently evidenced by the dint of *natural* Arguments, but depends upon the Certainty we have of *Christs* Resurrection, and the *Miracles* perform'd by him and his Apostles, which have been confirmed by unexceptionable Testimonies, but so many Ages since, that the Question now is of *matters of Fact*, and those of a very *ancient* date, for which reason this Doctrine is not so *evidently* true, as to gain *Belief*, and procure Mens assent upon the *first* Promulgation of it, without the

XLVIII.
That War
cannot be
justly made
upon those
who refuse
to embrace
the Christi-
an Religion.

(s) *Darius*.] The Son of *Hystaspes* and Father of *Xerxes*. Compare with this what's above, §. 11.

concurrent Assistance of God's Grace, in the distribution of which his Methods are intricate and unsearchable; when he affords it plentifully, Merit in us is not the Motive, and when he withholds it, or dispenses it but sparingly, it is for Reasons not unjust, but concealed from Men, and therefore not punishable by any Human Judicature. To this effect is that Canon of the Council of Toledo, (t) which forbids the use of compulsive Means in gaining Converts to Christianity, for on whom he will have mercy, he will have mercy; and whom he will he hardeneth; it being the Practice of the inspired Writers to (u) ascribe those Effects, whereof Human Reason cannot discover the Cause, to the Divine Will.

2. The second thing to be considered is, (z) that it was not the Intention of the Author of Christianity, that any should be forced by Temporal Punishments, or be awed by the dread of them, to a Profession of his Laws, Rom. viii. 15. Heb. ii. 15.

John

(t) Which forbids the use of Compulsive Means] Josephus is of Opinion that ev'ry one ought to worship God voluntarily and by Choice, and not by Violence and Constraint.

(u) Ascribe those Effects, whereof Human Reason cannot discover the Cause, to the Divine Will.] Servius at the beginning of the third Æneid, Whenever the Reason and Judgment of the Thing does not appear, sic visum, so it seems, is inserted. Thus too Donatus upon the Eunuch Act iv. Scen. ii. And Abarbanel observes, That the Hebrew וְדָן is put in this Sense.

(z) That it was not the Intention of the Author of Christianity, that any should be forced by temporal Punishment, or be awed by the Dread of them, to a Profession of his Laws,] This Subject is handled by Gregory Nazianzen, in his Oration, entitled, Cum assumptus est à Patre: And by Bede, l. xxvi. Isidore, speaking of King Sisebutus, who, in the Beginning of his Reign, attempting to bring over the Jews to the Christian Faith, had indeed a Zeal for God, but not according to Knowledge; for he compelled 'em by the Power of the Sword, when he ought to have won 'em by Reason and Argument. Rodericus has transcrib'd this Passage in his History, ii. 13. The later Kings of Spain, are, on this Account, blam'd by Orosius and Mariana; Pray consult him xxvi. 14. xxvii. 5.

John vi. 67. Luke ix. 54. Mat. xiii. 24. In which Sense Tertullian is doubtless in the right, when he says, that the Christian Religion avenges not it self by the help of the Sword. In an old Book Entituled, The Constitutions of Clement, it is said of Christ, that he indulged every Man in the freedom of his Will; not inflicting present Death as a Punishment for their Disobedience to his Laws, but bringing them to a strict Examination in the World to come. To the same purpose (y) St. Athanasius says, That our Lord, using no Force, but allowing every one the Liberty of his Choice, was contented to address himself to all in no other terms than these, If any Man will come after me: and to his Apostles, (z) Will ye also go away? and by disclaiming all Violence and Compulsion; as Chrysostom interprets this Passage of St. John.

3. The seeming Repugnancy that is in the Parable of the Great Supper to this, because we read that some were compelled to come in, will be easily removed, if we consider, that as in the Parabolical, so in the Doctrinal part of it, the word compell (a) signifies no more than earnestly to importune; in the same Acceptation do we find it in Luke

(y) St. Athanasius.] Epist. ad Solitarios.

(z) Will ye also go away?] St. Cyprian, Epist. c. v. Turning to his Apostles, he said Will ye also go away? Observing the Method of the Law, which leaving every Man to his own Liberty, and at his own Disposal, gives him the Choice of Life and Death, and so makes himself the Author of his own Fate.

(a) Signifies no more than earnestly to importune] St. Cyprian, de Idolotum vanitate with an Eye to this Passage, says, But the Disciples, by the Advice and Order of their Lord and Master, dispersing themselves over the whole World, were to offer Men the saving Precepts of God, to bring 'em out of Darkness and Error, to Light and Glory, and to hand the blind and ignorant to the Knowledge of the Truth. But lest this should be too slight a Proof of their Fidelity, and too nice and tender a Confession of Christ, Torments, Crosses, and a Thousand other Punishments, tempt and try their Strength and Constancy.

Luke xxiv. 29. and nothing different in Mat. xiv. 22. Mark vi. 45. Gal. ii. 14. Procopius in his secret History informs us, that (b) the Proceedings of Justinian were by wise Men censured, because in profelyting the Samaritans to Christianity, he made use of external Force and Menaces.

XLIX. *War may justly be made against those who persecute Christians, only for their being so.*

XLIX. 1. But they who raise *Persecutions* against Men, because they preach or profess *Christianity*, do, no doubt of it, act against the Dictates of *Reason*; for the *Christian Religion* (considered untainted with Mixture, and in its *primitive Purity*) is so far from doing any thing *destructive* to *Civil Society*, that in every Particular it tends to the *Advancement* of it. The Nature of it requires thus much, and its *Adversaries* must acknowledge the same. The account given by *Pliny* of the *Christians* is, that *binding themselves by Oath, they had abjured the Commission of Theft, and Robberies, and falsifying their Trust.* And of their Religion (c) *Ammianus* says, that *therein is nothing taught, but what is agreeable to Justice and Clemency.* And the common Expression, *Caius Seius is a good Man, only he is a Christian,* confirms all this. And as to the

Objecti-

(b) *The Proceedings of Justinian.*] See *Theobald's Letter* to the said *Justinian*, in *Cassiodore*, x. 26,

(c) *Ammianus.*] And he very justly calls *Christianity*, a Religion compleatly honest. And *Zosimus*, another Pagan says, *χριστιανῶν πίστεως* &c. 'Tis an Engagement of the Christian's Faith, to be free from every Crime and Impiety; and 'twas frequently stil'd by the Heathens, An harmless, inoffensive Sect. *Tertullian* *Scorpiakon* *Justin. Apologetic.* ii. *Ἀσέβητοι δὲ ὑμῖν* &c. We are, of all Men living, the People who contribute most to the Peace of your Government, because we teach and advance, That no wicked Person whatever, no gripping avaricious Creature, no traiterous designing Villain; nor, on the other Hand, any Man of Virtue, can lie conceal'd from God; and that each of those, according to the respective Merit of their Actions, are destin'd, either to eternal Punishment, or eternal Salvation. *Arnobius* speaking of the Meetings of the Christians, l. ii. *Where you can hear nothing but what tends to make Folks courteous, mild, grave, modest, chaste, and as generous to all Mankind, as if they were ever so nearly related to 'em.*

Objection, that all *Alterations*, particularly *Assemblies* and *Conventicles*, are to be feared, it is of no force; for those *Tenets* which encourage the Practice of all *Social Virtues*, especially that of *Obedience to Government*, tho' before *unheard of*, leave not the least room for *Fear*, nor ought the *Conventions* of *honest* and *inoffensive* People to be suspected, especially since they affect not any *Privacy*, unless compelled: What (d) *Philo* informs us to have been said by *Augustus* of the *Jewish Synagogues*, is more truly and properly applicable to the *Christian Congregations*, That they were not *Meetings* for *Revellings* or *Seditious Cabals*, but pure *Seminaries of Virtue*.

2. They therefore who persecute *Christians* as such, do make *themselves* justly obnoxious to a *Persecution*. 'Twas for this reason, that (e) *Constantine* commenced a *War* against *Licinius*, and (f) other *Emperors* against the *Persians*, in which the *Punishment* of the *Offenders* was not so much intended, as the *Protection* of the *Innocent*, of which we will treat hereafter.

L. 1. But as for those who use professed *Christians* with *Rigour*, because they are *doubtful*, or *Erroneous* as to some Points not delivered in *Sacred Writ*, or at least not so *expressly* but to be capable of *various* *Acceptations*, and which have been *differently* interpreted by the *Primitive Christians*,
VOL. II. M m they

L. But not against those who are mistaken in the Interpretation of the Divine Law; this illustrated by Authorities and Examples.

(d) *Philo* informs us.] In *Legat*. And in his Book *de sacrificantiis* he very elegantly shews the Difference between their *Synagogues* and the *Pagan Mysteries*: Both Passages are worth looking into. Something like this has *Josephus* in his Book against *Appion*.

(e) *Constantine* commenced *War* against *Licinius*.] See *Zonaras*. You have such another *Affair* in *St. Austin*, *Epist. L. Maximian, Bishop of Magia*, begs *Assistance* of a *Christian Emperor* against the *Enemies* of the *Church*, not so much to revenge his own *Injuries*, as to defend the *Church* committed to his *Care*. This is inserted in *Caus. xxiii. quest. iii.*

(f) Other *Emperors* against the *Persians*.] See *Menander Protector*.

they are undoubtedly *Criminal*; which is evident both from what has been already said, and from the standing Practice of the *Jews*, who tho' their Law had for its Barrier *Temporal Punishments*, did not inflict any upon the *Sadducees* for denying the *Resurrection of the Dead*, because (tho' infallibly true) it was not *directly* and *explicitly* asserted in their Law; but *obscurely* under the dark Veil of *Types* and *Figures*.

2. But suppose the *Error* be more *palpable*, and such as from the *Holy Scriptures*, if interpreted by *Impartial Judges*, and from the *concurrent Opinions* of the *Primitive Fathers* can easily be *refuted*; even in this Case 'tis requisite to consider how prevalent the force of a *long standing Opinion* is, and how *powerfully* the *Liking* every Man has to his own *Sett*, perverts his Judgment, and destroys the Freedom of it; an *Evil*, according to *Galen*, more incurable than a *Leprosie*. Very much to this purpose says *Origen*, *κοινησεν γὰρ ἅνθρωπον* &c. *That a Man with more ease can remove any Habit, tho' ever so inveterate, (g) than discard Notions that have been entertained a great while.* Besides, to determine how *Criminal* this is, it is requisite to be acquainted with the *Degrees of Men's Illumination*, and other inward Dispositions of Mind, the Knowledge of which no Man is indulged.

3. (h) According to *St. Austin's Definition*, an *Heretick*

(g) *Than discard Notions that have been entertain'd a great while.* *St. Chrysostom* is also in the same Mind upon 1 Cor. ii. *ὅταν ὁ* &c. But when once Opinions, says he, are become habitual to us, they are more than ever establish'd; and a Man would rather, and with less Difficulty, make any Alteration, than an Alteration in his Religion.

(h) According to *St. Austin's Definition*, an *Heretick*] In his Book *de militate erudendi*, the Passage is taken into Cause xxiv. *quest.* *St. Austin* adds, That he does not think an *Heretick* and the Man who believes an *Heretick* the same. See his clxii. *Epist.* and in l. i. c. d.

retick is one, (i) who out of a Desire of any Temporal Interest, chiefly of Glory and of being reputed Great, is the Author and Follower of new and Heterodox Opinions. Salvian's Judgment of the Arrians is thus expressed, They are Hereticks, but not wittingly; with respect to us, they are Hereticks, but not with respect to themselves, for so unquestionably do they think themselves Orthodox, that they load us with the Infamous Imputation of being Hereticks: What therefore they are to us, that do we seem to them: We are well assured, that their Conceptions of the Divine Generation are too mean; inasmuch as they assert the Son to be subject to the Father. And they think that we derogate from the Honour due unto the Father, by putting the Son on an Equality with him. The Truth is maintained by us, but they fancy it is so by them. God's Honour is advanced by us, but they imagine that their Belief is more conducive to it. In their Demeanour they are Rude and Uncourteous, but by the Laws of their Religion they judge themselves obliged to be so. In reality they are Impious, but in their own Thoughts truly Pious. They are guilty of Errors, (k) but 'tis out of an honest Intention, esteem-

M m 2

ing

c. de summa Trinitate, i. he calls Heresy, the Madness of an obstinate Mind.

(i) Out of a Desire of any temporal Interest, chiefly of Glory and of being reported great.] The Author of the Answers to the Orthodox, Quest. iv. ὁ δὲ αἰσίων &c. 'Tis evident, that either the Vanity or the Emulation of the Broachers gave Birth to all the Heresies in the World. St. Chrysostom upon Gal. v. ἡ δὲ ἡρесь &c. For Ambition is the Mother of Heresy.

(k) But 'tis out of an honest Intention.] Agathias, when in the first Book of his Histories, he had been relating the several Superstitions of the Almains, subjoins ἐλεῖν &c. But indeed who ever they are who offend against the Truth they deserve rather our Pity than our Hatred and are the more entitled to our Pardon: For they do not willingly deviate and stumble, but only when their Judgments are deceiv'd in their Pursuit of Good, whatever it is they have once entertain'd, they are obstinately tenacious of it.

ing them Indications of their Respect and Reverence to God. And that very part of their Creed, in which they are Unorthodox, they look upon as the Perfection of their Love of God. Now to what Degrees of Punishment this Error will entitle 'em at the Universal Judgment, (1) is a Secret to all but the Judge himself; but for the present it is my Opinion that God does patiently bear with them, because he sees, that tho' their Tenets be false, yet do they proceed from a misguided Zeal.

4. As to the Manicheans let us hear St. Austin, who himself was for a considerable time tainted with their Heresie. Let them, says he, exert their Rage against you, who know not what Labour and Pains the Discovery of the Truth costs, and with what Care and Circumspection Errors are avoided. Let them exert their Rage against you, who know not what an hard and extraordinary a thing it is to surmount the Chimera's of the Flesh, by the Light of a Religious Spirit. Let them exert their Rage, who are not sensible, with what Difficulties the Eye of our inward Man becomes so strong and clear, as to be able, without being dazled, to look upon its Sun. Let them exert their Rage, who are ignorant how many bitter Sighs and Groans we must emit, before we can arrive at the least Portion of Divine Knowledge. Finally, let them exert their Rage, who themselves are not seduced by any such Error, as it is your Unhappiness to be fallen into. But as for my own part, I can't be at all severe against

(1) Is a Secret to all but the Judge himself.] St. Chrysostom, in his Homily contra Anathematizantes. τὸ κερύματόν τοῦ Θεοῦ. 'Tis only for the Eternal Judge safe and without Danger to discover what's conceal'd; for him, who alone is acquainted both with the Measure of Knowledge, and the Proportion of Faith. For how do we know, pray tell me, what he will have to say for or against himself in that great Day, when God shall judge the Secrets of Men? For his Judgments are unsearchable, and his Ways past finding out!

gainst you, being perswaded 'tis my Duty to bear with your Infirmities, and to allow you the same mild and gentle Usage as others did me, when I blindly maintained, and madly persisted in these very Errors my self.

5. St. Athanasius, in his Epistle to the Hermits, sharply exclaims (m) against the Arrians, because they were the first who introduced the use of the Secular Power against Dissenters, endeavouring to bring over to their Opinion by Violence, Scourges and Prisons those, whom they could not convince by Dint of Reason; which (as he says) manifests how little they were actuated with substantial Piety, and the true Worship of God; spoken very probably in allusion to that of St. Paul, (n) Gal iv. 29. As then he that was born of the Flesh, persecuted him that was born of the Spirit, even so 'tis now. To the same effect does St. Hilary deliver his Sentiments, in his Speech to Constantine. And we have an account of (o) some Bishops in France, who

M m 3

in-

(m) Against the Arrians.] 'Tis not without Desert, that among Christians, we hate the Contrivers of so ill a Precedent. See their barbarous Actions in Eusebius's Life of Constantine. l. i. c. 38. In Socrates, l. iv. 29. in Procopius Vandal, 1. where he speaks of Honorick, and Gotth. 1. of Amalarich, and in Victor Usicensis. Epiphanius of the Semiarians. τὰς τὴν ἀλήθειαν &c. They persecute them who profess and teach the Truth, no longer desiring to turn the Orthodox by any other Arguments, than those of Hatred, and War, and Sword. Nor have they destroy'd one City or Country only, but laid Numbers of 'em in Ruins.

(n) Gal. iv. 29.] Upon which Passage, see St. Jerome, quoted c. qui secundum Cauf. xxiii. quest. iv.

(o) Some Bishops in France who incur'd the Censure of the Church.] Sulpitius Severus: But then Idacius and Ithasius began to be more urgent, and thinking that the Evil might at the Beginning be easily quash'd, very unadvisedly apply'd themselves to the secular Judges, that by their Order and Authority all Hereticks might be banish'd the Cities. And presently again, Their Accusers, the Bishops Idacius and Ithasius follow'd, whose Zeal for putting down Hereticks I should not at all blame, if they

incurr'd the Censure of the Church for procuring the Execution of the *Priscillianists*; the same Fate did an *Eastern Synod* undergo, for consenting to the burning of *Bogomilus*. 'Twas a wise Saying of *Plato*, that (p) the only Punishment of one under a Mistake, is to be better inform'd.

LI. But
justly a-
gainst those
who are
Impious to-
wards such
as they be-
lieve to be
Gods.

LI. I. (q) But to punish those who mind no Religion, and whose Deportment to the Objects which they esteem as Gods is irreverent, is but reasonable and just; and this in Conjunction with others was assigned a Cause of the *Peloponnesian War* be-

had not carried their Desires of Success a little too far. And indeed for my Part, I am neither pleas'd with one nor t'other. And afterwards, *Martin* residing at *Treves*, did all he could to persuade *Ithasius* to desist from the Prosecution. And *Maximus* beg'd of him, not any longer to seek the Blood of these unhappy People, alleging that it was sufficient, and more than sufficient, if Hereticks, by virtue of an Episcopal Sentence, were excluded the Church. See also what follows there.

(p) The only Punishment of one under a Mistake, is to be better inform'd.] *Seneca* in one of his Tragedies.

Who ever call'd an Error Criminal?

And in his 14th de *Ira*. No prudent Man will hate a Person for an Error, for if he does he must e'en hate himself. *M. Antoninus*. l. ix. εἰ μὴν δὲ ὁ ἄλλος ἁμαρτάνῃ. If you can teach 'em otherwise; but if not remember that your good Nature was given you for this very Purpose, and even the Gods are kind to such as these. *St. Chrysostom*, *Ephes. iv. 17.* ἀγνοῦντες ἅμαρταν. There's no Reason either to accuse or punish a Person for his Ignorance, but 'tis convenient that he should learn what he's ignorant of. *Ammianus Marcellinus* l. xxx. says in Commendation of *Valentinian*, That he never disturb'd any Body, nor commanded this or that to be worshipp'd; nor by Menaces and Threats forced his Subjects to stoop to his Way of Religion, but left those Matters just as he found 'em.

(q) But to punish those who mind no Religion, and whose Deportment to the Objects which they esteem as Gods is irreverent, is but reasonable and just.] See some admirable Passages upon this Subject in *St. Cyril's Fifth and Sixth Books against Julian*. And *Solon* encouraged the *Amphictyones* to make War upon the *Cirreans*, for offering Violence to the Temple at *Delphos*. *Plutarch* in his Life of *Solon*. So likewise those who pretend to be Prophets, do justly deserve to be punish'd. See *Agathias*. l. v.

between the *Athenians* and *Lacedemonians*, and of *Philip King of Macedon's War* with the *Phocians*, whose *Sacrilege* *Justin* represents to be such, that to have it expiated, the whole *World* should have united their *Forces*. *St. Jerom* upon *Daniel*, Ch. v. says, *As long as the Vessels were kept in the Idol Temple at Babylon the Lord was not wroth, (for these Vessels they looked upon as dedicated to God, and applied them accordingly, to Uses, in their mistaken Judgment, the best and most sacred.) but immediately upon their polluting them with ordinary Uses, their Sacrilege was attended with a severe Punishment.* And *St. Austin* thinks that *God* gave the *Romans* such great *Dominions*, because they had a *Zeal* for their *Religion*, tho' a false one, and because (as *Lactantius* says) they at least made a *Profession* of the principal *Duties* of *Man*, if they did not so conscientiously practise and discharge 'em

2. We have already taken notice, that whatever *God* we invoke in our *Oaths*, the *Violation* of them will be punished by the only *True God*; because (as *Seneca* says) we invoke him under the *Notion* of *God*, which *Opinion*, of ours makes us justly liable to *Punishment*. In this Sense I take too that other *Passage* of *Seneca*, *The Impugners of Religion* are in different places differently punished, but nowhere are suffered to go unpunished. And 'tis thus also that I understand *Plato*, when he's for inflicting *Death* upon all who despise *Religion*.

C H A P. XXI.

Of the Communication of Punishments.

I. How the
Partakers
of the Crime
must par-
take of the
Punishment

I. I. **O**UR Enquiry concerning the Communication of Punishments relates either to those (a) who are *Accomplices* in the Crime, or to others who are not so. *Accomplices* in a Crime are not said so properly to be punished for other Mens Faults, as *their own*. Who they are, then, is easily learnt from what has been already said in Reference to the *Damages consequent upon an Injury*. For generally, by the same Means a Man may be *Partaker* of another's Crime, as he is made liable to the *Reparation* of such *Damages*; tho' an *Obligation* to this is not always attended with a *Crime*; but then only when some more than *Ordinary Degree* of *Guilt* concurs; whereas to make a Man *accountable* for *Damages* received, the *least Degree* of *Offence* is frequently sufficient.

2. They therefore (b) who command a wicked Action; who, when requir'd, give their Consent to it; (c) who afford their Assistance; (d) who countenance

(a) *Who are Accomplices in the Crime.*] Tertullian de resurrectione carnis: For they'll say, that their Assistants and Companions are at their Liberty, either of helping and associating with 'em, or not; that it is at their own Choice, and in their own Power, either to be one or t'other, being no less than other People endued with Freedom of Will; and that therefore, since they voluntarily aid and abet 'em, they are as criminal as the Authors themselves.

(b) *Who command a wicked Action; who, when requir'd, give their Consent to it.*] Saulus manibus omnium lapidabat, Ev'ry Stone that was flung, was Saul's, says St. Austin, Serm. v. de sanctis, c. 4. you have something like this in his First Sermon upon that Subject, c. 3. and Serm. xiv.

(c) *Who afford their Assistance.*] Institution de Furtis. § Interdum Edict. Theuderic. c. 120.

(d) *Who countenance it when done.*] Hieronim. super parabolas. Not only the Thief, but the Person who, being privy to the Theft, conceals it from

tenance it when done, or are in any other Respect necessary to it, either (e) in advising, (f) commending, or encouraging the Fact; they (g) who prohibit it not, when under a strict Obligation of so doing, or who do not aid the Sufferer when invested with a proper Power and Authority thereunto; they who dissuade not, when in Duty they stand bound to do it; and they who then disclose not the Matter, when by vertue of some Law they are so oblig'd; These are All justly liable to Punishment, if there appear in them such a Measure of Guilt as deserves Punishment; according to the Rules laid down in the foregoing Chapter.

II. 1. This I shall illustrate by particular Instances. No Civil Society, or other Publick Body, is accountable for the Faults of its particular Members, unless it has concurred with them, or has been negligent in attending to its Charge. St. Austin very aptly distinguishes between the personal Sins

II. The State or the Superior Powers are accountable for the Crimes of their Subjects, if they know of em, and do not prevent em, when they can and ought to do so.

the Party robb'd, is guilty. Chrysostom, de salutis: εἰ δὲ οἱ ἐπιτροχῶντες &c. Not only those who forswear themselves, but those who are acquainted with the Perjury and endeavour to hide it, are criminal.

(e) In advising.] See the Institutions and Edict of Theuderic, in the aforementioned Places. Andronides, out of the Attic Law, τὸν βουλευσάμενον. The Adviser is as culpable as the Actor, εἰ δὲ ἢν πρᾶχθῆναι μὴ βουλευσάμενος. For, had there been no Adviser, the Thing had never been done, says Aristotle de Poetica, c. 17.

(f) Commending, or encouraging.] Sr. Chrysostom upon Rom. 1. about the End, καὶ ὁ τὴν πλημμελίαν, &c. He who praises a Fault is worse than him who commits one. By the Lombard Law, l. i. tit. 9. §. 25. The Stander-by, who puts the Person upon an ill Thing, is himself reputed the Actor of it. See what we shall produce by and by, at §. 25. out of Philo and Josephus.

(g) Who prohibits it not.] Chrysost. 1. adversus Judæos, ὡς αὐτὸς ἴψ' &c. So then, not only those who commit a Robbery, but those who are impower'd to prevent it, and do not prevent it, deserve Punishment, and that equally too: So likewise he, who hinders a Person's Cure, is as guilty, as if he himself had given him the Wound, says the same St. Chrysostom, upon 2. Cor. vii.

Sins of particular Men, and those they have in common with the rest of the Nation, the Commission of which is by universal Consent in a publick Convention agreed to. Hence that Condition so frequent in Treaties (*b*) *If the Revolt was a Publick Act.* The Locrians in Livy tell the Roman Senate that the Publick was not any ways concern'd in their Revolt. And the same Author reports that Zeno in his Justification of the Magnesians did with Tears beseech T. Quintus, and the other Legates, not to ascribe to a whole City the Follies of one particular Person, but that every Man shou'd at his own Expence pay for his Respective Extravagance. And the Rhodians beg of the Senate to distinguish betwixt the Cause of the Publick, and that of particular Men; affirming that there is no State which has not sometimes wicked Subjects and always an ignorant Mobb to deal with. So that neither is a Father responsible for his Children's Crimes, nor a Master for his Servants, nor any other Superior for the Faults of those under his Care; if they themselves be clear and guiltless.

2 Now among those Methods that render Governours the Accomplices in a Crime, there are Two of very frequent Use, and which require to be particularly consider'd, viz. *Toleration* and *Protection*. As to the *First* we thus determine, that a Man who is privy to a Fault and does not hinder it, when in a Capacity and under an *Obligation* of so doing, may

(*b*) *If the Revolt was a publick Act.* Chrysost. de Statuis iii. 870 & λοιπόν &c. 'Twas no common Crime of the State, but only the Indiscretion of some giddy Strangers and Foreigners, who acted with all the Precipitancy and Extravagance in the World; and it would be far from just, that such a City as that should be ruin'd for the Folly of a few moderate Creatures; or, that those who were intirely innocent, should suffer. Ammianus, l. xxx. Speaking of the Quadi. Alleging, That whatever the Affront, or Injury done us, was, 'twas never by the Consent of their Courts.

may properly be said to be the *Author* of it. *Cicero* in his Oration against *Piso* says, that 'tis much the same Thing, especially in a Consul, whether by destructive Laws and rebellious Speeches he disturbs the publick Peace himself, or connives at such a Practice in others. Thus *Brutus* to *Cicero*; Will you charge me with another's Crime? a Crime in every respect another's, when 'twas in his Power to have prevented it. To be in a Fault our selves, or not to forbid others to be so (says *Agapetus*, to *Justinian*) are equally Criminal. And *Arnobius*, The Sufferance of an Offence makes the Offender more forward and audacious. Thus *Salvian*, He who prevents not an ill Action, when 'tis in his Power, enjoins the doing of it; and *St. Austin*, Not to obviate and resist a Thing, is an Argument of our assenting to it.

3. So by the Roman Laws, he who kept not his Slave from being prostituted, when he might, was taken for the Prostitutor himself. And if a Servant with his Master's Knowledge commits Murder, the Master is accountable for it, because it seems to be the Master's Act; and when one Slave seduces another, the Punishment due to such a Crime is by the *Fabian* Law to be inflicted on the Master, if privy to it.

4. But as we said before, 'tis required that in Conjunction with the Knowledge there be sufficient Power to prevent it. (i) In this Sense are we to understand Knowledge, when the Laws pronounce it Criminal. So that 'tis he who becomes accountable for a Fault, who being invested with sufficient Power did not prohibit it; and when Knowledge is punishable, 'tis likewise presupposed that there be an

(i) In this Sense are we to understand Knowledge, when the Laws pronounce it criminal. Lex Wisigoth, l. viii. tit. ix. c. ii. c. 26. and in several other Parts, l. ix. tit. i. c. 1.

an *Assent* of the *Will*, and competent *Time* for *De- liberation*. As therefore, on the one hand, the *Actions* of *Servants*, who have taken up their *Free- dom*, or slight and disregard their *Master's* *Autho- rity*, are not imputable to their *Masters*, nor those of *Children* to their *Parents*, if not under their *Di- rection* and *Government*, because *Knowledge* with- out *Authority* will not amount to *Guilt*; so, on the other hand, are they not *chargeable* with any *Crimes*, though they have it in their *Power*, and could otherwise have *binder'd* 'em, if they are not *privy* to 'em. For to make a *Man* accountable for another's *Fault*, there ought to be a *Concur- rence* of *Knowledge* and *Permission*. All which will with respect to *Princes* and their *Subjects* hold e- qually good, because 'tis founded upon the *Law of Nature*.

§. And therefore *Proculus* thinks that of *Hesiod* not *Unreasonable*.

Πολλάκι κ' ἑμπάσα πόλις κακῷ ἀνδρὸς ἱπταυρή,

For one bad Man a whole People often smart.

because having proper *Power*, they exerted it not in preventing his *Wickedness*. So in the *Grecian* *Ar- my*, when *Agamemnon* himself, as well as the rest, had submitted to the *Determination* of a *Com- mon Council* of *War*, it was no hardship that

The People suffer, when the Prince offends. Creech.

(k) because 'twas their *Business* to have compell'd him to give the *Priest* his *Daughter*. So their
Navy

(k) Because 'twas their *Business* to have compell'd him to give the *Priest* his *Daughter*.] 'Tis thus that *St. Cyrill* explains this Matter, in his Fifth Book against *Julian*.

Navy is afterwards said to be burnt by *Pallas*,

(1) *For the Fault of one offending Foe.* Dryden.

Which *Affair* *Ovid*, *Metam.* xiv. expresses thus :

*The Maid he stole, yet what himself alone
Deserv'd to bear was felt by all the Rest;*

Because they did not hinder the Rape of the *Virgin-Priestess*. And we have an Account in *Livy*, that some *Laurentine* *Embassadors* having received *Violence* from Persons nearly related to *King Tatius*,
de-

(1) *For the Fault of one offending Foe.*] *Enripides* in his *Troades*, introduces *Neptune* speaking thus,

Οἶ δ' ἦν Ἰλίου Αἴας εἶλες Κασάνδραν βία.

I know it, when Ajax forc'd Cassandra.

And *Minerva* replying,

Κ' ἔθεν γ' Ἀχαιῶν ἔπαθεν, ἔ δ' ἦνυς ὕπαι.

*And the Greeks no Notice took, nor made him
Suffer for his Villany.*

And by the same Right *St. Chrysostom* involves all the People of *Antioch* in the Guilt of *Idolatry*, in his first Oration upon that Subject: ἰδὲ τὸ ἀμάρτημα &c. Few were directly concern'd in the Crime, but the Charge is common and universal. We are all upon their Accounts under sad Apprehensions, and expect our selves every Moment to be punish'd for what they have dared to do: Whereas, had we expell'd 'em the City, we might have prevented this, and had we manag'd the affected Part as we ought, we had not now been labouring under our present Fears. And then afterwards, δι' αὐτὸν &c. For this very Reason, says he, shall you smart, shall you be severely punish'd, because you were not there, because you did not forbid 'em, because you did not restrain the mad Wretches, nor hazard yourselves for the Emperor's Honour. You had no Share in their Proceedings, you did not join 'em in their Audaciousness; I commend you for it, and take it kindly; but inasmuch as you did not hinder the Fact it self, you are deservedly prosecuted,

demanded of him Satisfaction for this Infringment of the Law of Nations, but by the Interest his Relations had in him, together with their Intreaties, he was byassed in their Favour, for which he justly suffered the Punishment that was due to them. To this what Salva says of Kings is very properly applicable, that (m) the Supreme Power, which is able to prevent the Commission of the greatest Villanies, does by Toleration manifest its Approbation of them. And in Thucydides we read that ὁ ἀναστάς &c. He who can prevent a Crime, and does not, is more in Fault than the Actor. In Livy we find that the *Veientes* and *Latins* excus'd themselves, by urging that it was without their Privity, that the *Romans* Enemies had received Assistance from their Subjects. But the Excuse of *Tenta* the *Illyrian* Queen would not serve, when she endeavoured to vindicate her self by asserting, that not by her, but her Subjects the Piracy was committed; because tho' acquainted with their Practice, she did not prohibit them. And (n) the *Scyrians* were long since condemned by the *Amphictyones*, for permitting some of their People to play the Pirates.

6. Now

(m) The supreme Power, which is able to prevent the Commission of the greatest Villanies.] Philo in Flaccum. ὁ δὲ ἀναστάς &c. For he who has the Power of inflicting Punishments, might, if he pleas'd have put a Stop to it altogether; and if he did not hinder it, 'tis plain that he both permits and approves it. Dion Galba, τοῖς μὲν δὲ ἀναστάς &c. All that a private Person has to do, is to see that he does not himself offend; but Magistrates, and People in Government, are to take Care that others do not. In the Fourth Chapter of the Synod of Pistres, inserted among the Statutes of Charles the Bald, we have the following Sentence, He who neglects to reform what he might reform, does at the same Time give his Consent to the Fact; and therefore, no Doubt of it, makes himself an Accomplice in the Crime. See Nicetas Choniates, l. ii. de Andronico.

(n) The *Scyrians* were long since condemn'd by the *Amphictyones*.] Plutarch in his Life of Cimon.

6. Now 'tis Rational to conclude, that one must of necessity be sensible of Things that are publickly and frequently transacted; for (as *Dion Prusænsis* says) *the Practtice of considerable Numbers no Man can plead Ignorance of.* Polybius smartly reprehends the *Ætolians*, because when they would not *profess* themselves Enemies to *Philip*, they permitted their Subjects to exercise Acts of Hostility against him, and advanced their Prime Leaders to great Honours.

III. 1. Having thus discussed this Question, proceed we now, to shew how Guilt is contracted by *Protection* from Punishment: By the *Law of Nature*, as we observ'd before, every particular Person, if himself not chargeable with any such Crime, has the Privilege of *inflicting* Punishment; but since the Establishment of *States and Communities*, it is judg'd reasonable to transfer this Right to the respective *States* or their *Sovereigns*, according to whose Discretion all *Faults*, especially such as do more directly concern them, are to be *punished* or *remitted*.

III. And so are they if they allow a Retreat and Admittance to such as have done an ill Thing some where else.

2. But the *Prerogative* of punishing all sorts of Offences against *Human Societies* is not so exclusively theirs, but that sometimes other *Publick Bodies*, or their *Governours* have a Right to punish them; and therefore in all Societies *popular Actions* are commonly allowed, especially for those Crimes by which any other *State* or its *Sovereign* has been particularly damaged, to whom it undoubtedly belongs, either for the Maintenance of their *Honour*, or their future *Preservation*, to procure the Punishment of such Offenders from that *Nation* or *Prince*, to which the *Delinquent* is *Subject*.

IV. 1. But since for one *State* to admit within its Territories another *Foreign Power* upon the score of exacting Punishment is never practis'd, nor indeed convenient, it seems reasonable, that that

IV Unless they punish or deliver them up.

that *State* (o) where the *convicted* Offender lives or has taken Shelter, should, upon Application being made to it, either *punish* the demanded Person according to his *Demerits*, or else deliver him up to be treated at the Discretion of the *injured* Party. (p) This is that *Delivering* up so commonly to be met with in History.

2. Thus did the *Israelites* demand of the *Benjamites* the Delivery of those *Flagitious* Wretches mentioned in the xxth of *Judges*; and the *Philistins* of the *Hebrews* that *Sampson* as a *Malefactor* should be given 'em up, *Judges* xv. So did the *Lacedemonians* make War upon the *Messenians*, because they did not deliver up a Person who had slain several *Lacedemonians*; and at another time, for *protecting* from Punishment those who had deflowered some *Virgins* sent to Sacrifice. And *Cato* was for having *Cesar* surrendred to the *Germans* for the unjust War he had brought upon them. (q) The *Gauls* likewise insisted upon having the *Fabii* deliver'd to 'em, because they had invaded 'em. Thus did

(o) *Where the convicted Offender*] For a Man's Case ought to be known, before he's deliver'd up. 'Tis not reasonable *exigere* *ex dolo*, to give up Persons unwary'd. *Plutarch* in his *Romulus*. And the King of Scotland, in *Cambden*, at the Year lxxxv. tells *Queen Elizabeth*, That he would send *Fernhurst* and the *Chancellor* too into England, if by plain and legal Proofs they were found guilty of designedly breaking the Peace, or of having committed the Murder charg'd upon 'em.

(p) *This is that delivering up, so commonly met with in History.*] *Lucullus* demanded *Mithridates* of *Tigranes*, and upon his not giving him up, made War against him. *Appian* in his *Life of Mithridates*, and *Plutarch* in his *Lucullus*. The *Romans* requir'd of the *Allobroges*, to deliver 'em up the *Salge*, *Appian* excerpt. *legat.* xi. See *Priscus* exc. leg. 21. of a certain *Bishop*, whom the *Romans* were for giving up to the *Scythians*. A Duke of *Benevento* was deliver'd up by a *Gaseigne* Prince to *Ferdinand* King of *Castile*. *Mariana* xx. i.

(q) *The Gauls likewise insisted upon having the Fabii deliver'd to 'em.*] *Plutarch* in his *Camillus* *Appian*, exc. leg. 9.

did the *Romans* demand of the *Hernicians* some who had laid waste their Fields; and of the *Carthaginians*, *Amilcar*, not the famous *General*, but one who mov'd the *Gauls* to Rebellion, (r) and afterwards *Hannibal*; and of *Bocchus* they requir'd *Jugurtha* in these words, according to *Salust*, that so you may remove the *Necessity* we are now under of prosecuting you upon the score of your *Mistake*, and him upon the score of his *Villany*. And the *Romans* themselves did deliver up those who outraged the *Carthaginian* *Embassadors*, and them likewise who had used the *Embassadors* of the *Apolloniates* in the same manner. The *Acheans* demanded, that the *Lacedemonians* should deliver to them those who had laid Siege to *Larvicus*, adding that their *Refusal* would be by them construed a *Violation* of their *League*. The *Athenians* issued out a Proclamation importing, that whoever had conspired against *Philip*, and betook himself to *Athens* for a *Sanctuary*, should be immediately delivered up; and thus did the *Bæotians* demand of the *Hippatenses* the Murderers of *Phocus*.

3. But we are to understand here, that a *Prince* or *People* is not absolutely and strictly oblig'd to deliver up an Offender, but only, as we said before, must either punish him or deliver him up. Thus we read, that the *Eleans* made War on the *Lacedemonians*, because they would take no Notice of those who had injur'd 'em, that is, would neither inflict condign Punishment nor deliver them up. For the *Obligation* is either to one or t'other.

4. (s) Sometimes indeed the Persons demanding are indulg'd the Choice in Order to give 'em

V O L . II .

N n

a

(r) And afterwards *Hannibal*.] *Diodorus Siculus*, in *Frag. Livii*.

(s) Sometimes indeed the Persons demanding are indulg'd the Choice.]

See the *League* between the *Kings of England* and *Denmark*, mention'd by *Pontanus* in his *Treatise de Mari*.

a more than ordinary Satisfaction. We find in *Livy*, that the *Cerites* signifie to the Romans, That the *Tarquinius*, tho' they had asked no more than the Liberty of Passing, had yet enter'd their Country as arm'd and profess'd Enemies, and had taken by Force some of their Peasants to assist 'em in their Pillage: A Crime, which might very well be charg'd upon them; that they were ready, if they pleas'd, either to deliver 'em up, or to punish 'em themselves.

5. In the Articles of the Second League betwixt the Romans and the Carthaginians, transcribed by *Polybius*, there is a Passage very ill pointed, and as ill translated: *If that* (what That is, by reason of the precedent Defect, we cannot tell) *be not effected, then let every Man personally sue for his own Right, which if he then cannot obtain* (that is if Justice be not done him) *it shall be reputed a publick Fault.* *Æschines* in his Defence to the Accusation of Misconduct in his Embassy preferred against him by *Demosthenes* asserts, that when he was treating with *Philip* King of *Macedon*, concerning the general Peace of Greece, among other Things he told him, it was reasonable, that not the Publick, but those only who committed the Crime, should smart for it, and that there was no colour for injuring those States, which were willing to bring to Justice all suspected Persons. And *Quintilian* in his cclvth Declaration says, that in his Judgment (1) they who afford Shelter and Sanctuary to Deserters and Rebels, are almost as Criminal as the Deserters and Rebels themselves.

6. And

(1) They who afford Shelter and Sanctuary to Deserters and Rebels.] *Zonaras* in his Life of Prince *Basilus*, ἐπεμψεν πρὸς Χοσρόην &c. He sent to *Chosroes*, desiring him not to receive one who aim'd at the Crown, and who for that wicked Purpose, was actually in Arms against his own Lord and Sovereign, lest such a Precedent should be of ill Consequence to himself. See *Chalcondylas*, l. ix. about the Pirates receiv'd at *Lesbos*, very much in their own Wrong.

6. And among the Inconveniencies resulting from the Disagreement of States, *Dion Chrysostom* in his Oration to the *Nicomediens* reckons this for one, that *they who have been injurious to one State, may fly to and find Refuge in another.*

7. This Discourse of giving Persons up suggests to us another Question, *whether they who have been delivered up by one State, and not received by the other, do still continue Subjects of the former.* *Publius Mucius Scaevola* was for the Negative, because such a Surrender is as properly Banishment, as if they had been solemnly interdicted the use of Fire and Water: But *Brutus*, and since his time *Cicero* held the contrary; whom I think in the right, though not perhaps for the Reason assigned by *Cicero*; because as there is no Gift, so can there be no Delivery of a Criminal without an Acceptance. For indeed no Act of that kind can be compleat, unless both Parties be agreed. Whereas by the giving up we are now speaking of, we are to understand no more than the Permission for a Subject of ours to be so far under the Authority of another Government, as to be concluded by its Determination; by which there is no Conveyance of any Right, but only what before obstructed the Execution of the Punishment is thereby removed. And therefore if that other State makes no use of this Liberty, then is the Person that was delivered reduced to his former State of Subjection (this being a parallel Case with that of *Clodius* delivered up to, but not accepted by the *Corfians*) to be, at the Discretion of his own State, either punished or acquitted by 'em, as there are several Offences which give 'em a Dispensing Power to do either one or t'other. But the Privilege of a Subject, and other Rights and Properties, he is not by such a single Fact deprived of, unless condemn'd by a publick Judgment, or that some

Law already extant does declare the Crime he is guilty of, to be *immediately* so obnoxious which cannot be in the present case. So *Goods* likewise when offered, but not accepted, continue *his* whose they were before. But if the Person who, upon *Delivery*, was accepted of, shall chance afterwards to return, he is not then to be deem'd a Natural Subject, unless by an *after-Act* this Privilege be conferred upon him; in which Sense *Modestinus's* Answer about a Person *given up* is certainly very true.

8. What we have said on this Head, does not only respect those who were *born* Subjects of the Government they now live under, but them also who after the Commission of their Crimes fly thither.

V The Privilege of Suppliants or Refugees belong not to Offenders, but to the Unfortunate.

V. 1. The so much celebrated (u) Rights of *Suppliants* or *Refugees*, and the many *Precedents* of *Asylums*, affect not our last Conclusions; for they are intended only for the Benefit of them who suffer *undeservedly*, and not for such whose Practices have been injurious to any particular Men, or destructive of *Human Societies* in general. *Gylippus* the *Lacedemonian*, in *Diodorus Siculus*, speaking of the Privilege of *Refugees* has these Words: *It was the Design of the first Institutors of these Rights, that the Unfortunate should find Compassion, but that such who by their Villanies made Punishment their due, should not expect an Exemption from it.* And a little afterwards: *But let not those, who by Fraud and Avarice have made themselves miserable complain of Fortune, or dare to assume the Title of Suppliants, because that*

(u) Rights of Suppliants or Refugees.] Call'd by Polybius and Malchus in Exc. Legat. κοινοὶ ἱκεσίαι νόμοι, the common Laws of Intreaty and Address.

is due only to those (x) who are free from Guilt, tho' not from Infelicity; but the Flagitious Lives of these have divested them of any Claim to Compassion or Refuge. Between these two Cases of Fortune and Injustice Menander puts this nice Distinction, that

Ἀτύχημα καὶ ἀδίκημα διαφορὰν ἔχει;
Τὸ γὰρ διὰ τύχην γίγνεται τὸ δ' αἰρέσει.

(y) Misfortune and Injustice this Diff'rence have;
The one from Chance results, the other's Choice.

Not very foreign to this is that of Demosthenes, δίκαιον &c. translated to this effect by Cicero, in his second Book of Invention: *It is our Duty to have Compassion on such whose Misery is owing not to their Crimes but Misfortune.* And that of Antiphanes: *A Fault unwillingly committed must be ascribed to Fortune, but if with Design to our selves.* And that of Lysias, *Misfortune is no Body's Choice.* Accordingly by the Best and Wisest of Laws, he who

N n 3

by

(x) *Who are free from Guilt, tho' not from Infelicity.* An ancient Oracle delivers it self in the following Manner:

Ἐκτεινας τὸν ἐταῖρον ἀμύνων ἔσ' ἐμίανεν
Αἶμα. πέλεις δ' ἐχέρας καθαρώτερας ἢ πάρος ἦθα.

Endeav'ring to assist, you've kill'd your Friend,
Not tainted with his Blood at all: Your Hands
Much cleaner than they were before.

(y) *Misfortune and Injustice.* Philo de Judice, ἐλεος ἐπ' ἀτυχάμασιν &c. Misfortunes claim our Pity; but he who voluntarily does amiss is not unfortunate, but unjust. Thus Marcus Antoninus is for having the Mind inspected ἵνα ἐπισήσῃς &c. That you may know whether 'twas Ignorance or Design, and to proceed accordingly. Thus too Totilas in Procop. Goth. iii. distinguishes between τὰ ἐξ ἀγνοίας ἢ λήθους, what is owing to Ignorance and Forgetfulness, and τὰ ἐκ προνοίας, what is the Effect of Premeditation.

by an *Accidental* slip of a Weapon chanced to kill a Man, might safely betake himself to the *Cities of Refuge*; and the *same Protection* was allowed to *Slaves*; but the very *Altar of God* was no *Sanctuary* to him, who was a *premeditated Murderer*, or a *Disturber of the publick Peace*. *Philo* in his *Explication of this Law* says, That *no consecrated Place can afford Shelter to such vile Wretches*. The same was the Practice of the *Ancient Greeks*. The *Chalcidians* are said (2) to have denied the Delivery of *Nauplius* to the *Grecians*; the Reason assigned was, because he had proved himself *innocent of the Crimes* laid to his Charge.

2. *Cicero*, *Pausanias*, (a) *Servius* and *Theophilus* mention an *Altar of Mercy* among the *Athenians*, of which we have an ample Description in *Papinius*. But for whom was this design'd? Let the *Poet* inform you, who tells you that

The Distress'd have made it Sacred:

And he says that those who came thither are

Such

(2) *To have denied the Delivery.*] King *Pepin* receiv'd such as fled to him out of *Normandy* on the Account of their great Oppressions there, nor would he ever give 'em up. This Passage is in *Fredegar's History of Pepin* at the Year 688. And the Emperor *Ludovicus Pius* receiv'd those who fled to him from the Church of *Rome*, as appears from a Decree of his, made *Anno 817*. inserted in the second Tome of the Councils of *France*: And *Charles the Bald*, those who came over to him from his Brother *Lewis*. *Aymonius* l. v. c. 34. See *Zonaras* in his Account of *Constantine Monomachus's* Affairs about one *Cegenapatzinaca* not deliver'd up at the Request of *Tyrasthus*. Nor was *Osmanes* given up to *Eskitar* by General *Inunginus*. *Leunclavius* in his second Book of the *Turkish History*. And the *Portuguese* refus'd to deliver *Albuquerque*, as *Mariana* observes. xvi. 18.

(a) *Servius.*] upon the 8th *Æneid*.

*Such as by Chance of War their Native Country fly,
Or of their Crowns divested seek a foreign Aid.*

Aristides makes it (b) the peculiar Commendation of the *Athenians*, that they always administred Succour and Relief to those, who through Misfortune became Objects of Pity. And again he says, that the Distressed of all Parts of the World had this Felicity in Common, that in the good City of Athens they were sure to find a Retreat of Security. In *Xenophon* we have *Patroclus Philiaſtus* in an Oration of his spoke at Athens, commending that City; because that they who were any ways oppressed, or in Danger of being so, were sure to meet with a kind Reception, and a generous Assistance there. *Demasthenes* in a Letter of his in Favour of *Lycurgus's* Children speaks to the same effect. And *Oedipus*, in a Tragedy of that Name, is introduced (c) by *Sophocles*, upon his Retreat to *Colonos*, representing his case in the following manner:

*The Woes I bear, are Numerous and Great,
But I only bear 'em: God is my Witness
That none of these Facts was ever once my Choice.*

To whom *Theseus* replies:

*You're Wellcome, Oedipus, such Guests I value,
Depend on my Assistance and Protection,
I know my self I'm Man, and therefore subject
No less than you to Human Casualties.*

N n 4

So

(b) The peculiar Commendation of the Athenians.] Which *Mariana* attributes to the *Arragonians*, xx. 3. And the *Gepide*. Every Man of 'em chose rather to perish, than give up *Udigisales* either to the *Romans* or *Lombards*. *Procop. Goth.* iv.

(c) By *Sophocles*.] See the whole Passage, 'tis very well worth your reading.

So Demophoon the Son of Theseus thus accosts the Descendants of Hercules, who had fled to Athens :

*This Country of ours has at all Times been
To the Distress'd a Refuge; to those Distress'd
Who justly claim a Right of being secure.
Ten Thousand Dangers has its Friendship cost it
Already, and now another Hazard's run
Of a near impending Ill.*

And this is the very Thing that Callisthenes cry'd up the Athenians for; because that (d) in the Defence of Hercules's Children, says he, they engaged in a War against Eurytheus, who then Tyranniz'd over Greece.

3. But on the contrary, 'tis of Malefactors and Profligate wicked People in the same Tragedy thus pronounced :

*The Lawless Guilty Wretch who dares approach
The Sacred Altars of the Gods and there
For Pardon sues,
To tear him from his Hopes of Sanctuary
And drag him down to Justice, for my Part
I cannot think't a Breach of Piety.
For 'tis but Reas'n that he who does what's Ill
Should suffer for it.*

And in his Ione he adds :

*No barb'rous Hand must e'er presume to touch
The awful Place where Deities reside :
But, that their Temples to the Good should be
Of Common Access, is what's highly Fit,
To screen the Innocent from farther Mischiefs.*

Lycurgus

(c) In the Defence of Hercules's Children.] See Euripides in his *Heraclida*, and *Apollodorus*.

Lycurgus the Orator relates, that a certain Person named *Callistratus*, who was guilty of a *Capital* Offence, having consulted the *Oracle*, had this Answer return'd him, that if he would go to *Athens*, τὴν νομῶν, (e) *he should have Justice done him*; that upon these hopes of *Impunity* he fled (f) to *Athens*, to the Altar reputed the *most Sacred* there; but that notwithstanding he was slain by Order of the *State*, a *State* the most strictly observant of every thing *Religious* among 'em, and that so the *Oracle's* Promise was accomplish'd. *Tacitus* blames some of the *Grecian* Cities, because in his time 'twas usual with them to encourage Wickedness by protecting the *Authors* of it, and to think that thereby they endeared themselves to their *Gods*. And in another Place he says, that *Princes are the Representatives of the Gods*, but that neither by the *Gods are the Petitions of any but of the just regarded*.

4. Upon the Whole therefore, such *Criminals* are either to be *punished* or *delivered up*, or at least oblig'd to *quit* their *Shelter*. Thus the *Cymeans*, as *Herodotus* tells the Story, when to give up *Pactyes* the *Persian* they were very unwilling, and to retain him they did not dare, permitted him to make his *Escape* to *Mitylene*. The *Romans* demanded of *Philip of Macedon*, *Demetrius Pharius*, who being overcome in Battle, had fled to him for

(e) *He should have Justice done him.*] Nor do the *Gods*, says *Tacitus*, in his *Third Book of Annals*, hear the Prayers of those who address them, unless they are just ones.

(f) *To Athens, to the Altar reputed the most sacred there.*] *Mariana* in his *xxi Book* relates, That at *Portugal* one *Ferdinand*, Lord High Chamberlain, was forced from the Church to which he had retir'd, and burnt for a Rape committed upon a Maid of Quality. See also about *Sanctuaries*, a Treatise of that great Man *Paul the Venetian*, *Societatis Servorum*, as 'tis call'd.

for Refuge; (g) *Perseus* the Macedonian King speaking in his own Defence to *Martius*, with reference to those who were said to have a Design upon *Eumenes* says, *as soon as I was inform'd by you, that they were in Macedon, I strictly enjoined their immediate Departure out of the Kingdom, and have for ever forbid them Entrance into my Territories.*

5. But in most Parts of Europe, especially in this, and the preceding Century, this Right of demanding Fugitive Delinquents to Punishment, has not been insisted upon, unless their Crimes be such as affect the State, or are of a very *Heinous* and *Malignant* Nature. As for *lesser* Faults it has been the Custom to *connive* at 'em, (h) unless by the *Articles* of Treaty it has been particularly agreed on to the contrary. And here we must observe too, that *Robbers* and *Pirates*, who by

(g) *Perseus the Macedonian King*.] *Appianus* too has this Relation, *Excerpt. Legat. Num. xx.* Something like it is what you have in the *Latin* Life of *Themistocles*: *When he was publicly demanded by the Athenians and Lacedemonians, Admetus King of the Molossi would not deliver up his Refugee, but advis'd him to provide for his Safety; and for this Purpose order'd him to be conducted under a sufficient Guard to Pydna.* So also the *Gepida* in *Procopius*, *Goth. iii.* dismiss *Ildgis* the *Lombard*. Add to this *Theoderick's* Letter to King *Thrasamund* about the receiving of *Giselic*, v. 43, 44. and what's in the Life of King *Lewis*; so the Emperor *Rudolphus* the Second remov'd from him *Christopher Sborovius*, as is testify'd by *Thuanus*, l. 83. *Anno 1585* Queen *Elizabeth* answer'd the *Scots*, that she would either deliver 'em up *Bothwell*, or banish him *England*. *Camdenus* has this Affair about the Year 1593. See *Mariana* xix. 6. of *Alphonsus* Earl of *Gegion*, who was condemn'd by the *French* King, and deny'd Admission into *Spain*.

(h) *Unless by the Articles of Treaty it has been particularly agreed on to the contrary.*] As in the *Switzers* League with the People of *Milan*, *Simlerus* relates this Matter. By the Treaty of the *English* with the *French*, it was provided, that *Rebels* and *Deserters* should be deliver'd up; and by another of theirs with the *Burgundians*, that they should be expell'd. *Camden* at the Year 1600.

by their Increase in *Strength* and *Numbers* have made themselves *formidable*, may very justly be entertained and protected, so far as regards their Punishment; because to bring them off from this *Per-nicious* Course of Life by Assurances of *Pardon*, when other Expedients fail, is what the common Interest of Mankind requires; and therefore the Practice of this, either by *King* or *Nation*, is certainly *Warrantable*.

VI. 1. Here likewise 'tis to be observ'd that *Refugees* are, whilst their Case is depending, entitl'd to *Protection*. Thus *Demophoon* to the *Embassader* of *Eurystheus*:

*If you've any Crime to charge those Strangers with
We'll bear your Allegations, but you mustn't
Expect to take 'em hence by Force.*

VI. But all sorts of Refugees are to be protected till their Cause be decided; and by what Law such a Decision is to be had,

And *Theseus* in another Tragedy to *Creon*.

*You have offer'd, Sir, a base unworthy Thing,
Unworthy your self, your Ancestors and Thebes:
You're in a State where Laws and Justice reign,
And yet you think to do whate'er you please,
And carry All before you, without Regard
To Piety or Manners.*

*And does this Place so destitute appear,
So mean and tame, so easie to impose on;
And myself so Poor a Fool, so trifling,
So insignificant, so meer a Cypher?
Great Amphion's Government ne'er taught you thus,
A Government not us'd to educate
A Wild and Savage and Inhuman People:
Nor will it, when it bears this odd Relation,
Approve your Actions; when it bears that you
The Rights of Heav'n break thro' no less than ours,
By tearing from us the unhappy Wretches
Who in our Kindness trusting sue Relief.*

Were

*Were I at Thebes, and tho' my Claim were Just,
Yet would I not by Violence attempt
To vindicate my own Pretensions
Without the Sov'reign's Leave, I cou'dn't forget
A Stranger's Duty in a Foreign Land.
But you your Country shame, fix Scandal on't
It do'sn't deserve: And tho' advanc'd in Years
Your Understanding's young.*

2. That if what is laid to the Charge of Refugees be not a Crime by the Law of Nature or that of Nations, then it must be determined by the Civil Laws of the State they come from; which is excellently shewed by *Æschylus* in his *Supplikes*, where the King of *Argos* is introduced thus addressing himself to a Company of *Grecians* coming from *Egypt*.

Εἰ τοι ἐγὼ τῶσι παῖδες &c.

*If Ægypt's Race should any Claim pretend
O'er you, by any Law or Rule of theirs,
Because they say they're of your Family,
Who could withstand the Plea, or argue't false?
Why, you must prove by your own Native Laws
That they have no such Pow'r.*

VII. How Subjects participate of their Sovereign's Crime or the Members of a Community of the Crimes of that Community; and how the Punishment of a whole State differs from that of particular Persons.

VII. 1. We have already seen by what means Rulers may participate of the Crimes of their Subjects, whether Natives or Foreigners. On the other hand Subjects too may make themselves Accessary to their Prince's Faults, by giving their Consent to them, or by acting at his Instance or by his Command what is Illegal; but to treat of this will be more proper hereafter, when we come to consider each Branch of the Subject's Duty. There is likewise a Communication of Guilt between Generals and Particulars, for (as *St. Austin* says in the fore-cited

cited place) *where there's a Universal there must needs be Particulars, because an Universal is composed of Particulars, and Particulars collected and united, make up together what we call an Universal.*

2. But yet the Faults of this *Compound* are, in Propriety of Speech, *theirs* only who voted for the Commission of them, and not theirs who were obliged to submit to the others *majority*; and the *Punishment* likewise of the whole *Community*, and that of *particular* Persons are distinct. As the *Punishment* of *Particulars* is sometimes *Death*, so the *Ruin* of a *State* is the *Death* of it, and this happens when there is an entire *Dissolution* of the *Body Politick*, of which we have already treated, whereupon that *State* does, as *Modestinus* says very well, as utterly lose all its *Privileges* and *Advantages* as if by *Death*. Sometimes a *Servile State* is imposed on *particular* Persons by way of *Punishment*, as it was upon the *Thebans* by *Alexander the Macedonian*, exclusive of those who opposed passing the *Act* for shaking off his *Government*: So likewise a *whole Nation* is sometimes brought to a *Civil Slavery*, by being reduced into a *Province*. The *Goods* of *particular* Persons are sometimes *Confiscated*, so the *State* is sometimes divested of all it has in common, as its *Walls*, *Magazines*, *Men of War*, *Arms*, *Elephants*, *Treasury* and *Public Lands*.

3. But to punish *particular* Men with the loss of their *Properties*, for the faults of the *Public*, to which they did not consent, is a Piece of great *Injustice*, as it is clearly evinced by *Libanius* in his *Oration* concerning the *Sedition* at *Antioch*. And (i) he mightily approves the *Proceedings* of *Theodosius*,

(i) He mightily approves the *Proceedings* of *Theodosius*.] *St. Chrysostom* in his *xviii. de Statuis*, says the same upon this Subject as *Libanius*

dofius, who had punished a *Public Crime* with the Forfeiture of their *Theatres*, their *Baths*, and the Title of *Metropolitan*.

VIII. How long after the Commission of a Fault may a Community be punish'd for it.

VIII. 1. But here occurs a Question very well worth our Consideration, *Whether or no a Punishment due to the Faults of a Community, may at any time whatever be inflicted.* That it may, during the continuance of that very Community, seems reasonable, because tho' there be a *Succession* of the constituent *Parts*, the *Body* is still the same, as we have elsewhere proved. But on the other hand we must observe, that some things are *essential* to a Community, as 'tis a Community, such as the having of a *Treasury*, *Laws*, &c. other things are applied to it only as *derived* from the *single Members* of it. In this Sense we give to a Nation the Character of *Learned*, or *Valiant*, because many of it are such. Of this sort is the *Demerit* of a State, that being properly applicable to *particular Persons* only, as endued with a *Rational Faculty*, and not to the *Community*, which of it self is not so endued. And therefore when they are extinct and gone, through whose means the *Publick* contracted the *Guilt*, the *Guilt* also must cease too, and by consequence the *Obligation* of *Punishment*, which (as we before observed) can never subsist without some *Demerit*. *Libanius* in the above-mentioned Oration, says, That in his Judgment, when none of the *actual Offenders* are yet in being, no farther Satisfaction should be sought after.

2. We

banus does; and *Marcus Antoninus* the Philosopher, as is recorded by *Capitolinus*, had formerly decreed just such another Punishment for these *Antiochians*; and *Severus* for the People of *Constantinople*, taking from them their *Theatre*, their *Baths*, their *Titles of Honour*, and all that was *beautiful and ornamental*, and giving their very City to the *Perinthians*. See *Herodian* ii. *Zonaras*, and what we said above.

2. We must therefore conclude *Arrianus* in the right, when he condemned (k) *Alexander* for punishing the *Persians*, when not one of them who had injured the *Greeks* was then surviving. The Opinion of *Curtius* concerning the Extirpation of the *Branchidae* by *Alexander* is, that had these Severities been contriv'd for and executed upon the Authors of the Treason, it would have look'd like Justice, and not Cruelty. But now their Posterity (who never saw *Miletum*, and consequently could not betray it to *Xerxes*) smart for their Predecessors Crimes. The same is *Arrianus's* Sentiment of the burning of *Persopolis* by way of Revenge, for what the *Persians* had formerly done to the *Athenians*: ἀλλ' ἔσ' ἴμοι &c. In my Opinion, (says he) *Alexander* did not act discreetly in this Affair, nor do I think it any Punishment of those *Persians* who were long since dead and no more.

3. The Answer given by *Agathocles* to the People of *Ithaca*, upon the Complaint of some Damages done them, that truly the *Sicilians* had been much greater Sufferers by *Ulysses*, is perfectly ridiculous. *Plutarch* in his Book against *Herodorus* says, 'tis very unlikely that the *Corinthians* should be for revenging upon the *Samians* an Injury receiv'd three Ages before. Nor is the Defence of this and such other Proceedings which we meet with in *Plutarch*, in his Treatise of the last Vengeance of God, any ways well grounded. For God's Right is different

(k) *Alexander* for punishing the *Persians*.] And therefore, *Julian* in his Encomium of *Constantius*, assigns another Cause to that War, καὶ ὅτι μὲν ἕδεις &c. Never was any War thus had the Face of Justice, ever undertaken upon such a Ground, either by the *Greeks* against *Troy*, or the *Macedonians* against the *Persians*, as is evident even to a Child, for they ne'er inflicted new Punishments for old antiquated Crimes, either upon Children, or Grandchildren but only invaded such as had robb'd and dispossest of their Crowns the Posterity of those who had deserved well of all the World.

ferent from that of *Man*, as you'll find more distinctly by and by. Nor does the Justice of conferring *Honours* and *Rewards* upon Children for their Father's Merits, infer the Equity of punishing them for their Faults: For a *Benefit* is of such a Nature, that it may without any Injury be conferred on any Man, but it is not so with *Punishment*.

IX Whether one Free from the Fault may be liable to the Punishment.

IX. Having thus trac'd the ways by which a participation of the *Crimes* draws after it a participation of the Punishment, we come now to shew how a Man may be obnoxious to *Punishment*, tho' free from *Guilt*; that this Matter may be apprehended, and there be no confusion of things really different by Reason of a *likeness* in the Terms, 'twill be proper to premise some Directions.

X A distinction between what is direct and intended, and what happens consequentially.

X. 1. First that a Distinction should be made between an intended and *direct* Damage, and what is only *consequentially* such. Depriving a Man of what he has an indisputable Property in, I take to be a Damage *directly* done. A *Consequential* Damage I apprehend to be, when a Man is intercepted of a *future* Benefit he expected, by the Removal of the Condition which alone could entitle him to it. *Ulpian* gives us this instance, *If by opening a Well in my own Land I exhaust those subterraneous Channels, from which another is supplied, the Damage resulting to him from my using my own Property, is not imputable to me as a Fault.* And elsewhere he says, that *there's a great deal of difference betwixt doing an Injury, and depriving a Man of some Advantage which he before enjoyed.* And *Paulus the Civilian* says, *it is a preposterous Method to account our selves Rich, before we are in actual Possession of what makes us so.*

2. The Sufferings that redound to *Children* from the Confiscation of their *Father's* Goods, is not a Punishment inflicted on them, for they could not lay

lay any claim to those Effects, unless they had been possess'd by their Father at the time of his Decease. And this *Alphenus* very justly observes, when he says, that *Children by the Father's Punishment lose what would have come to 'em from him, but what is theirs by Nature, or from any other Cause, they are not thereby divested of.* *Cicero* writes, that the Children of *Themistocles* were reduced to Want, and that if *Lepidus's* Children had the same Fate, he thought it no Hardship. This he asserts to be anciently practised by all Nations, from the Rigor of which the more modern *Roman* Laws somewhat abated. Thus when the *major* part of a *Community* (which as we elsewhere said, represents the *whole*) are guilty of a Fault, the *whole* being, as we told you, obliged to bear the blame of it in the loss of their *Civil Privileges*, their *Walls*, and other *Conveniencies*, the *innocent* part are equally *Sufferers*, but are so in those things only which they held in the Name and Right of the *whole*.

XI. 1. Again it is observable, that one Man's Crime may be the *occasion* of inflicting on another some *Evil*, or depriving him of some *Good*; tho' as to the Right of acting, that *Crime* is not the immediate *Cause* of the Action. Thus he who is *Bail* for another, suffers upon the account of the *other's Debt*, according to the old Proverb, *ἰγγυα δ' ἄτα, Be bound for a Man, and depend upon't you'll pay for't*: But the new and immediate Cause of this Obligation is his own being *Bail*. And as he, who *engages* for the *Purchaser*, becomes answerable, not properly on the account of the *Purchase*, but upon his own *Engagement*; so he who *vouches* for an Offender, is made liable to Punishment, not for the *Offence*, but because he *vouched* for him; for which Reason his Sufferings ought to be proportioned according to the *Power* or

XI. The Difference between a Crime's being the Occasion of Punishment, and its being the real Cause of it.

Right he himself had to Vouch, and not according to the Nature of the other's Offence.

2. From whence it follows, that agreeably to an Opinion which we look upon to be the truer, no Body ought to be put to *Death* upon the score of any such Engagement, because no Man's *Life* is so entirely at his own disposal, as to take it away himself, or to Authorize another so to do; tho' the *Greeks* and *Romans* held the contrary, (1) thinking that *Sponsors* were accountable even to loss of *Life*; as is evident from a Verse of *Ausonius*, and the known Story of *Damon* and *Pythias*, and from their inflicting capital Punishment on *Hostages*, (m) as we shall elsewhere have occasion to observe. The Conclusion we make with respect to a Man's Power over his *Life* holds good likewise with respect to that he has over any of his *Members*; for the Amputation of any one of them is not allowable, unless it tends to the Preservation of the whole *Body*.

3. But if *Banishment*, or a *Fine*, be the Terms of the Delinquent, and he becomes obnoxious to 'em, the *Bail* must stand to it; but in strictness of Speech, not as a *Punishment* of his own. Much the same is the case of one who enjoys a *precari-*

(1) Thinking that Sponsors were accountable even to Loss of Life. This is plain from Reuben's Words to his Father Jacob. Gen. xli. 37. and in Josephus, antiq. Hist. ii. c. 3. Eutropius in his *Caligula* calls 'em *Asi-furus*, Persons engaging Life for Life: Diodorus Siculus *ἰγγυντὰς θανάτου*, Sureties of Death. Exc. Peires. St. Chrysostom upon Gal. ii. καὶ ἀντὶ τοῦτο &c. As when a Man is condemn'd to die if another innocent Person be willing to suffer for him, he frees him from his Punishment. And St. Austin in his fifth Epistle to Macedonius And sometimes he who is the Occasion of another's Death, is more Faulty than he who kills him: As for Instance, if a Man deceives his Bail, and so makes him suffer that just Punishment which he himself should bear.

(m) As we shall elsewhere have Occasion to observe. In B. iii. c. iv. §. 14.

ous Right depending on the good Will and Pleasure of another with regard to the absolute Propriety of the Thing, and the *Right of Subjects* with regard to that *eminent* Property with which the *State* is invested for the *publick* Advantage. For the taking away any such *Privilege*, cannot be called the infliction of a *Punishment*, but the execution of an *antecedent* Right, which the Person who takes it away was before entitled to. Thus the *slaying* of a *Beast*, one for instance which a Man has been criminally concern'd with, (as is enjoined (n) by the Law of *Moses*) is not really a *Punishment*, because *Beasts* are not properly chargeable with any *Crime*, but 'tis the effect of that *Dominion* Man has over them.

XII. 1. Having laid down these Distinctions, we assert that no Man, if entirely *innocent*, can be punished for *Another's* Crime. Of which the true Reason is, *not* that assigned by *Paulus the Civilian*, that *all Punishment is designed for Mens Reformation*, for one may make an Example *without* the Person of the *Criminal*, provided it be in the Person of one who nearly touches him, as we shall shew you presently; but *because all Obligation to Punishment is grounded upon Guilt*. Now Guilt must of Necessity be *personal*, because it results from our *Will*, than which nothing can be said to be more strictly *ours*, and it is therefore styl'd *avrety* *εὐνοία*, something entirely at our own Disposal.

XIII. 1. St. *Jerome* says, that neither the *Virtues* nor the *Vices* of *Parents* are ascribed to the *Children*. And St. *Austin*, that it would be *Injustice* in *God* to condemn any *innocent* Person. *Dion Chrysostom*, in his last Oration having asserted, that according

XII. No Man properly speaking, can be justly punished for another's Fault, and the Reason why.

XIII. Nor Children for the Faults of their Parents.

O O 2

to

(n) By the Law of *Moses*.] About which Law, see *Maimonides* in his *Ductor Dubitantium*, iii. 40.

to the Laws of *Solon* among the *Athenians*, the *Parents Crimes* affected the *Children*, says, that the *Divine Law* does not, as that there, extend the *Punishment* to the *Posterity* of *Offenders*, but every one's *Misfortunes* are owing to himself: Agreeable to which is that common Expression, *Noxa caput sequitur*, The Crime goes along with the Person. We Ordain, say the *Christian Emperors*, that where the *Guilt* is found, there the *Punishment* be laid. And again, Let every Man be answerable for his own Sins; and where *Punishment* is not due, let it not be dreaded.

2. (g) *Philo* says, it is just that *Offenders* should themselves alone be punished, condemning that barbarous Practice of some Nations, who put to Death the *Innocent Issue* of *Traytors* and *Tyrants*. So likewise does *Dionysius* of *Halicarnassus*, and shews the *Unjustness* of the pretended Reason for it, because it is supposed they will imitate their Parents, since this is no more than bare *Supposition* and *Uncertainty*, and an *uncertain Fear* is not sufficient to put any Man to Death. There was a Fellow, I don't know who he was, had the Confidence to tell *Arcadius*, the *Christian Emperor*, That the *Children* of *Criminals*, who are likely to follow their Examples,

(o) *Philo* says.] And in his Book *de Pietate*, $\eta\varsigma \ \epsilon\kappa \ \alpha\nu \ \omicron\iota\delta' \ \&c.$ There can be no Persuasion of more dangerous Consequence, than that which is not for having the wicked who are descended of good People punished, nor any Honour and Respect paid to the Good if of wicked Progenitors, since the Law judges every one by his own Merits, and neither commends a Man for the Virtues of his Relations, nor condemns him for their Vices. And *Josephus* calls the contrary Fact in *Alexander King* of the *Jews*, $\upsilon\pi\epsilon\rho \ \alpha\nu\delta\rho\omicron\tau\omicron\nu \ \delta\iota\kappa\eta\nu$, a Severity more than human. Thus *Ovid*:

There Fair Andromeda by Partial Jove
Was for her Mother's Tongue to suffer doom'd
Chains and Confinement.

Who kills the Father and saves the Son's a Fool.

3. *Pausanias* the Grecian General did no manner of harm to the Children of *Attaginus*, who was the Author of the *Theban's* Desertion to the *Medes*, judging them entirely Guiltless, *because they could have no hand in that Affair*. And *Marcus Antoninus*, in a Letter of his to the Roman Senate, has the following Clause, (p) *And therefore you shall pardon the Children, Wife, and Son-in-law of Avilius Cassius, (who had conspired against him) but why do I say pardon, when they have done nothing that has occasion for it?*

XIV. 1. *God* indeed, in the Law given to the *Hebrews*, threatens to visit the Iniquity of the Fathers upon their Posterity: But as for Him, He has an absolute and unlimited Dominion as well over our *Lives* as our *Effects*, as things he has *lent* us, and which therefore without assigning any Reason and

XIV. The
Objection
from God's
Proceedings
in relation
to the Chil-
dren of Of-
fenders, an-
swer'd.

O o 3

(p) And therefore you shall pardon the Children, Wife, and Son-in-law of Avidius Cassius.] See also *Vulcatius* in his Life of *Avidius*; *Julian* commends the like Humanity in *Constantius*, and shews ill Parents have often good Children, as Rocks produce Bees, a bitter Wood produces, and Thorns the Pomegranate. The following Period is his, *Ὁ δὲ τὸν πατέρα &c.* But you took great Care not to let the Infant die, the decess'd be involv'd in his Father's Punishment: This Proceeding is yours so much tending to Lenity and good Nature, is an evident Sign of a perfect Virtue.

at any time he may deprive us of. And therefore if by an unexpected and violent Death he snatches away the Children of Achan, Saul, Jeroboam, and Ahab, (q) 'tis by his Right of Property and not of Punishment, and he does thereby more severely punish the Parents themselves; for if they live to see their Children fall (which is the case principally intended in the Law of God, whose Menaces on that account (r) are not extended beyond the Great-grand-children or fourth Generation, Exod. xx. 5. because that is a sight which Human Age may possibly arrive at) such a Spectacle must undoubtedly be a Punishment more afflicting to them than any thing they can feel themselves, as is well observed by Chrysostom, to whom Plutarch agrees, when he affirms that there is no Punishment so piercing as to see those descended from our selves by our selves made miserable; or if they don't live so long as this comes to, yet to die under such an Apprehension must needs be a very sensible Affliction. Tertullian says, that the hardness of Peoples Hearts forced God upon this severe expedient, (s) that so their concern for their Children after 'em might induce 'em to be obedient to his Laws.

2. 'Tis at the same time observable, that this Grievous Punishment was inflicted by God for no other Crimes, but such as had a direct and immediate Tendency to his Dishonour, as the Worship of false Gods, Perjury and Sacrilege. Nor had the
Greeks

(q) 'Tis by his Right of Property and not of Punishment.] This is the Opinion of Rabbi Simon Barsema, and a very just one.

(r) Are not extended beyond the Great Grand-children.] You have Instances of this in Zimri and Jehu.

(s) That so their Concern for their Children after 'em, might induce 'em to be obedient to his Laws.] Alexander in Curtius lib. vii. 'Twas not for you to know what they design'd to do with these, that you yourselves might fall in greater Agonies.

Greeks any other Notion of this Affair: Those Crimes that were thought to affect the guilty Person's *Posterity*, (t) by them call'd *ἀγν*, *horrible Impieties*, were all of this Nature; upon which head *Plutarch* has a most excellent Dissertation in his Book *de sera numinis vindicta*. (u) In *Ælian* there is extant the following *Delphick Oracle*:

*Or soon or late Justice is sure to seize
The Authors of a Crime, nor can they 'scape
Inexorable Vengeance. Tho' from Jove
Descended, They and Theirs shall one Time feel
The Weight of Heav'n's Anger: In horrid Pomp
From House to House shall dire Confusion run
And stalk thro' all the Family.*

(x) He was treating there of *Sacrilege*; and this is further ratified by the Story of the *Gold of Tholouse*, as 'tis related by *Strabo* and *Gellius*. We gave you above several such Authorities against *Perjury*. 'Tis likewise observable, that those severe *Threats* of God are but rarely put in execution by him, especially when the *Children* prove to be (y) eminently *Virtuous*, as is manifest from *Ezek. xviii.* and the many Examples produced by *Plutarch* in the above-mentioned place.

O o 4

3. And

(t) By them call'd *ἀγν*, *horrible Impieties*.] See *Plutarch* in his *Pericles*, and what was said above in this Book, ch. xiii. §. 1.

(u) In *Ælian*.] l. iii. 43.

(x) He was treating there of *Sacrilege*.] As *Libanius* does too, &c. of *μυστ* &c. Some of 'em have already been punish'd, others not yet; but there's nobody can exempt 'em from suffering, I mean them, their *Children*, and their *Children's Children*. And the same *Libanius* has something like this in an Oration of his publish'd by *Gothofrede*.

(y) Eminently *virtuous*.] And express publicly a Detestation of their Father's Crime, as the Emperor *Andronicus Palæologus* did, in *Gregoras*, l. v. c. 81.

3. And therefore in the Gospel, where there is a more exprefs Declaration than formerly of the *Punishments* that *after* this Life await the *Impious*, (2) there is no *Threatning* advanced beyond the *Sinner's* Person; and 'tis to this Dispensation that *Ezekiel* in the aforecited Chapter chiefly alludes, tho' not so clearly as 'twas usual with the *Prophets*. But 'tis not for *Men* to imitate *God* in this Respect; nor is the Reason for it the same, because, as we said just now, *God* has Power over our Lives, to take them away without any Regard to our Demerits, whereas *Man* cannot pretend to any such Power, till by a *Capital* and *Personal* Offence we have invested him with it.

4. And therefore that very *Divine* Law does strictly prohibit both the putting to Death the *Children* for the *Fathers* Faults, and the *Fathers* for the *Childrens*: Which Law was observed by some of (a) the Religious Kings of *Judah*, even with respect to *Treasonable* Practices. This Law is highly commended by *Josephus* and *Philo*, as one like it among the *Egyptians* is by *Isocrates*, and one among the *Romans* by (b) *Dionysius Halicarnassensis*. *Callistratus* the *Civilian* translates a Passage out of *Plato* to this Effect, that *neither the Crime, nor the Punishment of the Father, does any way attaint the Son*; and assigns this Reason, *because every Man runs the Risque of his own Doings, and no one is made the Inheritor of another's Crimes. Would any State in the World*

(2) There is no Threatning advanced beyond the Sinner's Person] *Tertullian* de *Monogamia*. The *sumer Grape* that the *Father* eats, no longer sets the *Childrens* Teeth on Edge, for every one must die in his own Iniquity.

(a) The Religious Kings.] Such as *Amasiah*.

(b) *Dionysius Halicarnassensis*.] Who speaks thus, το εδος &c. 'Tis a peculiar Custom among the *Romans*, to exempt the *Children* of Malefactors from all Manner of Punishment. The *Wifigothic* Law has the same, l. vi. tit. i. c. 8.

World (says Cicero) tolerate such a Law-giver as should condemn the Innocent Son or Grand-child, for the Father's or Grand-father's Offence? Upon this account it was that (c) to execute a Woman with Child was by the *Ægyptian, Grecian* and (d) *Roman Laws* deemed an *Impious Severity*.

XV. But if the *Laws* sentencing to Death the *Children* of Delinquents be unjust; how much more then is that of the *Persians* and *Macedonians*, which (e) takes away the Lives of All who are any ways *Related*, that so (as Curtius says) whoever had offended against the Majesty of the King might fall with more Solemn Sadness and more Poignant Sorrow. This Law (f) *Ammianus Marcellinus* reports to be without a Parallel severe.

XVI. I. But it must be considered, that if the *Children* of Traitors have either in Possession or Reversion any thing whose *Property* is not in them, but in the Prince or People, it may lawfully be taken from them by Vertue of that *Property*, provided that the Exercise of this *Prerogative* be an Aggravation of the Offender's Punishment: Upon this Ground (as *Plutarch* relates) the Descendants of *Antiphanes*, as a Traitor, (g) were for ever disqualified for Honours; and at Rome the Children of the

XV. Much less should other Relations be punished.

XVI. But yet may Children and Relations of Offenders be deny'd what they would otherwise have enjoyed.

(c) To execute a Woman with Child, was by the *Ægyptian, Grecian, and Roman Laws*, deem'd an *impious Severity*] This *Philocommends* in his Treatise de *humanitate*.

(d) *Roman*.] *L. Imperator Adrianus*, D. de Statu Hominum, L. pręnantis, D. de pęnis.

(e) Takes away the Lives of all who are any Ways related] *Philosays*, 'Twas usual with Tyrants to put to Death, together with the Persons condemn'd, Five Families of their next Relations. See *Herodian*, l. iii. and an Instance at Milan upon the Murder of *Galeatius*, *Bezar* in l. xiv.

(f) *Ammianus Marcellinus*.] He calls 'em abominable Laws. See also *The Council of Toledo*, iv.

(g) Were for ever disqualified for Honours.] You'll meet with such another Affair in C. in quibusdam de pęnis.

the *Proscribed*, by *Sylla*. And so what is decreed in the aforesaid Law of *Arcadius* against the *Children* of such is what may pretty well be born with, *Let 'em never be advanced to any Places of Honour or Trust, either Civil or Military*. But as to *Slavery*, how and how far it may justly affect *Children*, we have elsewhere shewed.

XVII. Nor
are Subjects
properly pu-
nishable for
the Prince's
Crimes.

XVII. 1. What we have said with respect to making the *Children* Sufferers for the *Parent's* Crime, is applicable to the Case of a *People* who are really and strictly Subjects, (For, as we told you, a *People* who are not Subjects may be punish'd for their own Faults, that is, on Account of their own Negligence) if the Question be, *whether such a People are punish'd for their Prince's or Superior's Crimes*. For our Inquiry here is not (h) *whether they gave their Consent or concurr'd in any Action that of it self deserves Punishment*, but we are now talking of the Contract which naturally results from the Constitution of that *Body* whereof the *King* is *Head* and the *Rest* Members. God for the Sin of *David* sent a *Pestilence* on the *People*, (who in *David's* Judgment were entirely Innocent) but 'twas God who did it, who had an *Absolute Sovereignty* over their Lives.

2. And besides this was properly *David's* Punishment, and not the *People's*; for as a Christian Author observes: *πικροτάτη τιμωρία &c.* The severest

(h) *Whether they gave their Consent.*] *Philo* speaking of the *Ægyptian* King's Subjects in *Abraham's* Days, *παραπλάουσιν &c.* His whole Family as well as he, had their Share in the Punishment, because not one of 'em blam'd his Injustice, but were all as it were, *Accomplices* with him, by applauding what he did. And *Josephus*, where he relates the Prophecy denounced against *Jeroboam*, *μετέξει &c.* The *People* too are to bear their Part in the Punishment, and are therefore to lose that good Land, and to be dispers'd beyond *Euphrates*, because they follow'd the Impieties of their Prince.

rest Punishment that wicked Princes can undergo is that which is laid on their Subjects. For this, says the same Author, is just as if you should lash a Man upon his Back for an ill thing his Hand had done: And Plutarch on the like Subject, compares it to the Physicians applying a Caustick to the Toe for the Cure of a Pain in the Thigh. But why 'tis Illegal for Men to take this Liberty, is already declared.

XVIII. The same do we likewise pronounce of not punishing particular Persons with the Loss of what's properly and peculiarly their own for the Fault of the Publick, if they have not consented to it.

XVIII. Nor particular Persons for the Faults of the whole, if they refused their Consent.

XIX. Why the Heir is bound to other Debts and Obligations (i) and yet not subject to the Punishment of the Deceas'd, according to that of Paulus the Civilian, 'tis provided by the Rules of a Fictitious Right that the Punishment due to any one should not be transferr'd upon his Heirs, the true Reason is, that the Heir does not take upon him the Person of the Deceased in his Deserts or Demerits, which are Qualities merely Personal, (k) but only in his Effects; and in These, upon this Principle that at one and the same Time that Property was introduced, it was made an establish'd Law that what-ever was owing to a Man from the Inequality of Things should be inseparable from 'em. Thus Dion Pruseensis in his Rhodiaca: ἀπαντα ὀφειλῶσι &c. what was due from Predecessors is no less due from their Posterity. For you can't say, that we have renounc'd our Succession.

XIX. The Heir not liable to Punishment, as such; and why.

XX. 1. From whence it follows, that if, over and above the Merit, there appear some new Cause

XX. But he is liable if the Punishment pass into an Obligation of another Nature.

(i) And yet not subject to the Punishment of the deceas'd.] Maimonides, tir. כדלה. c. vii. §. 6. Gemara Baba Cama, c. ix. §. 2.

(k) But only in his Effects.] See the Council of Toledo, viii. in Rescarnthus's Case; and what's above in this Book, ch. xiv. §. 10. There's no Person so proper to personate the deceas'd as his Heir, says Cicero, in his Second de legibus.

Cause of Obligation, the Heir may be bound to stand to the *Penalty*, tho' not Properly as a *Punishment*. Thus in some Places after Sentence is pronounced, and in others after the Matter in Dispute is sufficiently evidenced, which are Circumstances that give Force and Value to a *Contract*, the Heir shall be liable to a *Fine*, as much as if the Payment of so much Mony had been actually agreed on, for now there is a fresh Obligation risen.

C H A P. XXII.

Of the unjust Causes of War.

I. The Difference between the Real and pretended Causes of War shew'd.

I. 1. **I**N the Beginning of our Treatise concerning the *Causes of War* we observed that some were *justifying*, and others *Perswasive*. Polybius the first Author of the Distinction (a) calls the one *προφάσεις*, *Publick Pretences*, as being usually such

as

(a) Calls the one *προφάσεις* publick Pretences, as being usually such as are openly assign'd the Motives of the War, (Livy sometimes styles 'em the Title of the War) to the other he gives the general Name of *αἰτίαι*, Reasons.] This Distinction is made too by Plutarch in his *Galba*; and Dion in the Affairs of *Cesar* and *Pompey*; and by Polybius, where he treats of the Roman War against the *Illyrians*, Excerpt. Legat. 126. You had better call 'em, with Suetonius, the Pretext and the Causes, for so he expresses it where he speaks of *Julius Caesar*: This was his Pretext indeed for a civil War; but all the World are of Opinion, that the Causes were something else. Thucydides in some Places distinguishes between *πρόφασις* the Pretence, and *τὸ ἀληθές* the Truth, as in the Athenian's Descent upon Sicily, where the Pretence was to assist the People of *Barbara*, but the Truth and Reality was their Desire of seizing upon Sicily for themselves. Hermocrates in an Harangue of his speaking of the Athenians, calls That the Colour, This the Intent. You have both these Passages in Thucydides's sixth Book. And Appian in his *Mithridatic* uses the Word *προφάσεων*; and in his sixth *Civilium*, where he treats of the Peace between *Ottavius* and *Sextus Pompeius* being broken, he says, That the conceal'd Reasons were

as are openly assign'd the *Motives* of the War, (*Livy* sometimes terms 'em the *Title* of the War) to the other he gives the general Name of *causae*, *Reasons*.

2. Thus in the War of *Alexander* against *Darius*, to take Vengeance of the *Persians* for the Injuries they had formerly done the *Greeks*, was the pretended Reason, whilst the Real Motive was a strong Desire of *Glory*, *Empire*, and *Riches*, in Conjunction with Confident Hopes of Success conceiv'd from the Fortunate Expeditions of *Xenophon* and *Agésilas*. So in the Second *Carthaginian* War, the Pretence was a Controversie about *Saguntum*, but the Real Cause was an old Grudge entertain'd by the *Carthaginians* against the *Romans* for the hard Terms they were oblig'd to accept of, when reduc'd to a low Condition, and (as *Polybius* takes Notice) their being animated and flush'd by the Successes which had of late attended their Arms in *Spain*. So *Thucydides* is of Opinion, that the true Cause of the *Lacedemonian* War was a suspicious Jealousie of the over-growing Power of the *Athenians*, but a Quarrel with them about the *Corcyreans*, *Potidians*, and some other Things was the Reason by them assign'd; (b) tho' in

were quite different from those that were declar'd. *Agathias* in his Fifth Book, what others term *πρόφασις* calls *συνήθη καὶ προδόλιμα*, Fiction and Disguise; to which he opposes *αἰτίαν* in *Hist. Hunn. Zanurgan*. Add to this what we said above in Chap. i. §. 1. of this Book. *Procop. Persic. ii.* says, That 'tis but Folly to be reserv'd when the Action is directed by Justice and attended with Advantage.

(b) Tho' in this Place he seems to confound the Terms *προφάσις* and *αἰτία*.] And so in his Fifth Book, discoursing of the *Argives* Expedition against the *Epidaurii*, what he had before call'd *πρόφασις*, he presently after styles *αἰτίαν*, just as we observ'd in the said Chap. i. §. 1. of this Book, that the *Greek ἀρχαί*, and the Latin *Principia*, are Words of an ambiguous Sense. The Writers of the *Con-*

in this Place he seems to confound the Terms *προφάσεις*, and *αἰτίαι*. The same Distinction do we find in the Speech of the *Campanians* to the *Romans*, where they *profess* that 'twas in order to aid the *Sidicines* that they took up Arms against the *Samnites*, whereas in Reality their own Interest induced them to it, foreseeing that if the *Sidicines* were once set on Fire, the Flames would soon reach them. *Livy* reports too that *Antiochus* made War upon the *Romans* for the Murder of *Barcilla*, and some other *Injuries*, as he pretended, but the Real Incitement was some extraordinary Hopes he had conceived from the Remissness of the *Roman* Discipline. *Plutarch* remarks that *Cicero's* Charge against *Antony* as being the Cause of the Civil War was not true; (c) for *Antony* only furnish'd *Cæsar*, who was already determin'd for the War, with a plausible Pretence for it.

II. To engage in a War without either of these Causes is brutish

II. 2. But there are some who engage themselves in War having neither of these Causes, (d)

CO-

Constantinopolitan Empire, frequently call that *πάρεκλος*, which others stile *πρόφασις*, from the Story of *Achilles*, who made *Patroclus* the Occasion of his taking up Arms again.

(c) For *Antony* only furnish'd *Cæsar*, who was already determined for the War, with a plausible Pretence for it.] ταῦτα πάλαι &c. For this furnish'd him, who had been a great while in Want of such a Pretence, with something that look'd like a handsome Reason for a War. These Words are in this History of *Plutarch*; and *Lucan* says,

————— *Cunctasq; Pudoris*
Rumpunt Fata Moras: Justos Fortuna laborat,
Esse Ducis Motus & Causas invenit Armis.

The Fates break thro' what Modesty retards:
Fortune would fain have Justice move a Prince,
And therefore finds out Reasons for his Arms.

(d) Coveting (as *Tacitus* represents 'em) Dangers for Danger's sake.] *Amianus* in his 31st Book speaking of the *Lithuanians*, What Pleasure is to Men of quiet and peaceable Tempers, the same Delights are Dangers and Wars to them.

coveting (as Tacitus represents 'em) *Dangers for Danger's sake*. This *Vice* so far passes the Bounds of *Humanity*, that by *Aristotle* 'tis stiled *Brutishness*. *Seneca* speaking of such Wretches, says, *To take Pleasure in Massacrees is not so properly Cruelty, (e) as Ferity and Savageness: one might call it Distracti-* on; for there are several Sorts of this, but none of 'em more visibly so, than that which carries People to the Murders and Butcheries of their own Kind. Consonant to this is that of *Aristotle* in his last *Nicomach*: ὁβρὺν γὰρ &c. For he is superlatively barbarous, who for nothing but the sake of fighting and spilling human Blood converts his Friends into Enemies. And *Dion Pruseensis* says that to be engaged without any Reason in Wars and Broils is perfect Madness, a seeking one's own Destruction. And *Seneca* in his fourth Epistle; the Effusion of humane Blood for it's own sake, and no other Reason, is what scarce any Man can be guilty of.

III. 1. But the Generality of those who engage in Wars are induced thereto by plausible *Persuasive* Reasons, either in Conjunction with such as are justifying, or without 'em. Some there are, who don't care whether they have any justifiable Reasons at all, of whom we may pronounce, as the *Roman Lawyers* do, that he's a *Rogue* and *Villain (f)* who being call'd to Account how he came by such and such Things can shew no Right he

III. A War without a just Reason is no better than Robbery.

(e) *As Ferity and Savageness.* And in his Second Book *de Ira*, speaking of *Apollodorus* and *Phalaris*, This is not Passion but Brutishness.

(f) *Who being called to Account how he came by such and such Things, can shew no Right he has to 'em, but only that he has them in Possession.* L. pro Heredi. §. ultimo, & sequentibus Legibus. D. de Hereditatis Petitione. Such was the πόλεμος ἀπροσάριστος of the *Heruli* against the *Lombards*, a War without the least Pretence for one. And the *Gauls* in *Livy* affirm, That their Swords determine what is right or wrong, and that a Man of Bravery and Courage has Claim to every Thing.

he has to 'em, but only that they are in his Possession; And *Aristotle* says of the common *Instigators* to War, that *they seldom consider the Injustice of enslaving their inoffensive Neighbours and such as no Ways injure them.*

2. Of this Stamp was *Brennus*, who asserted, that *the strongest have always the best Title.* So *Hannibal*, whose Motto, according to *Silius*, was

Justice and Leagues to me my Sword points out.

And so *Atila*, and all others who are ready at every Turn to tell you, that

*The Reason of the War they ne'er inquire,
Its Conclusion's all they care for.*

And,

To be o'ercome is Argument of Guilt.

And,

Successful Arms are always in the Right.

Applicable to this is that of *St. Austin*, *To make War on our Neighbours, from thence to push our Violence farther on, and so to oppress inoffensive People out of a Thirst after Empire, what Title does it deserve, but that of a Notorious Robbery?* Of these Wars *Velleius* says, that they are not enter'd into on the Account of any just Provocation, but only for the Advantage that's expected from 'em. And we read in *Cicero* in his first Book of Offices, *That Elevation of Soul which discovers its self in Hazards and Fatigues, unless contending for Justice, is so far from being a Principle of Virtue, that it is indeed (g) a Piece of the most barbarous*

(g) *A Piece of the most barbarous Inhumanity.* *Agathias* l. ii. *ὅτι καὶ κέρδες ἔσται.* But whoever out of a Prospect of Gain, or out of an unreason-

rous Inhumanity. They, says *Andronicus Rhodius*, who for some great Interest of their own, take where they ought not to take, are called Wicked, Impious and Unjust, (b) such as Tyrants, and those who depopulate Cities.

IV. Some there are, who before they enter upon a War, declare their *Motives* for so doing, which they pretend to be just ones; but if they are brought to the Standard of Reason they are found to be otherwise. And in this Case (to use *Livy's* Expression) the Dispute is not who's in the Right, but who is the most Powerful. The Generality of Princes, says *Plutarch*, employ the two Terms of War and Peace, as they do their Money, not for what is just and Honest, but for what will serve their Turns. The Knowledge of what Causes are unjust, may be pretty well collected from the just Causes already mentioned. For the Windings of a Crooked Line presently appear upon its Application to a straight one. However, to make the matter as plain as we can, we will insist a little upon the Principal of 'em.

IV. There are some Reasons which upon first appearance seem justifiable, but will not bear the Test of Examination.

VOL. II.

P p

V. 1. First

unreasonable Enmity without any Manner of just Quarrel, are mov'd to invade a foreign People who have done 'em no Injury in the World, are insolent, and base, and wicked. *Menander* gives us a remarkable Instance of this: *ὅτι Βασιλεὺς &c.* Because *Bajanus* Chief of the *Avari*, without any Occasion or Colour at all for so doing and without vouchsafing to offer any, even the most false and trifling Reasons against the *Romans*, had shamefully and in a most barbarous Manner broke the Treaty.

(b) Such as Tyrants.] *Rhilo* upon the Decalogue excellently observes. That *δοιοι τοις υἱοῖς &c.* Those who when they have got a sufficient Force to maintain 'em in their Villanies, plunder whole Cities defying Punishment, because they think themselves much above the Laws, are People in their Natures and Principles rude and mobbish, who affect Dominion and Power, commit great Robberies, and cloak what is in Reality and good Earnest a downright Piece of Theft and Roguery, with the venerable Title of Magistracy and Government. This agrees very well with what was produced out of *Curtius*, *Justin*, *Seneſa*, and *St. Austin* at the aforesaid Chap. 1. §. 1. of this Book.

V. Such
as are un-
certain
Fear.

V. 1. First therefore, the *Dread* (as we before observed) of our Neighbour's encreasing Strength, is not a warrantable ground for making War upon him. To justify taking up Arms in our own Defence, there ought to be a Necessity for so doing, which there is not, unless we are sure with a Moral Certainty, that he has not only Forces sufficient, but a full Intention to injure us.

2. Wherefore their Opinion is not to be assented to, who maintain that 'tis lawful to bring War upon a Neighbouring Prince, who in his own Territories shall erect a *Castle*, or other *Fortified Place*, which may some time or other be detrimental to us, tho' he is under no Obligation to the contrary by any previous Compact. For to remove such Apprehensions we should apply ourselves to the raising such within our own Dominions, and look out for other Remedies, rather than immediately have recourse to War. From whence 'tis deducible, that the War of the Romans against Philip King of Macedon, and of Lysimachus against Demetrius, if they had no other Cause, were not just. I am wonderfully pleased with that of Tacitus about the *Cauchi*, They are a People of the greatest Repute and Figure in all Germany, and chuse to maintain their Grandeur by their Justice, living Quiet and Private, as free from Ambition as from Weakness. They give no Occasion for Wars, committing neither Outrage nor Robbery; and what is a prodigious Argument of their Valour and their Strength, they act the Sovereigns without having acquir'd their Superiority by Injury and Oppression. However, they are always in a readiness for War, and can, if their Affairs require it, raise an Army in an Instant, being well provided with Men and Horses, and thus do they in the midst of Peace keep up the Character of a powerful Nation.

VI. No

VI. Nor does the *Advantage* from a War give us as good a Right as a *Necessity* for one.

VI. An Advantage without a Necessity.

VII. Nor is the *Refusal of supplying us with Wives*, tho' there be great plenty of Women, a just Provocation to War, which was what moved *Hercules* against *Eurytus*, and (i) *Darius* against the *Scythians*.

VII. Refusal of Marriages, when there's plenty of Women.

VIII. Nor is the Desire of changing our former Settlements, of removing from *Moorish* and Desert Ground to a more fertile Soil, a just Plea for making War, which *Tacitus* reports to be the Cause of most of the Wars amongst the Ancient *Germans*.

VIII. The Desire of a better Land.

IX. Nor is it less unjust to go to War, and lay claim to a Place upon the score of making the first Discovery of it, if already *inhabited*, tho' but by Men void of Piety, Religion, and good Sense; because by the *Right of Discovery* we can pretend to those Places only which are *not appropriated*.

IX. The Discovery of things that belong to others.

X. 1. Nor is the being endued with Virtues *Moral or Divine*, or an extraordinary Capacity, a Qualification Absolutely requisite for *Property*, unless if there be a People entirely destitute of the Use of Reason, that then dispossessing them may seem defensible; and all that Charity would in that case oblige one to, is to allow 'em *Necessaries* sufficient for Life. What has been already delivered with respect to the Provisions made by the *Laws of Nations*, for preserving the *Rights and Properties* of *Infants* and *Idiots*, is to be applied to those with whom *Compacts* and *Agreements* can be made, which these People totally void of Reason are not qualified for, if any such there be, which is very questionable.

X. But what if the first Possessors are Fools.

P p 2

2. The

(i) *Darius against the Scythians.*] And Antoninus Caracalla against Artabanus King of the Parthians. See Xiphilinus.

2. The Greeks therefore were to blame, who thought the *Barbarians* naturally their *Enemies*, because they were different in their Manners, and of more shallow Apprehensions (in their Opinions) than themselves. But how far upon the Account of Enormous Crimes, Crimes against *Nature* or prejudicial to *Human Society*, 'tis lawful to dispossess People, is a different Query, and already discussed in our Discourse about the *Right of Punishments*.

XI. The Desire of Liberty in a People who are subject, is also an unjust Reason.

XI. (k) Nor is the taking up Arms upon the Account of *Liberty* justifiable in particular Persons, or a whole Community; as if to be in such a State or a State of *Independence*, was *Naturally*, and at all Times every one's Prerogative. For when Men are said to be *by Nature* in a State of *Freedom*, by *Nature* is to be understood the *Right of Nature*, as 'tis antecedent to all Human Acts to the contrary; and the *Freedom* there meant is a *Freedom* in a *private*, and not a *Contradictory* Sense, that is, tho' a Man be not *by Nature* a *Slave* or *subject* to any, yet from thence he cannot derive a *Right* of being always exempted from *Slavery* and *Subjection*, for in this Sense no body living is *Free*. And this is what *Albutius* intends, when he says, that no Man is born either a *Freeman* or *Slave*, but these Names *Fortune* gives 'em afterwards. Thus *Aristotle* $\nu\theta\mu\omega \tau \mu\psi \delta' \sigma\lambda\omicron\nu \epsilon\tilde{\iota}\nu$ $\tau \delta' \epsilon\lambda\epsilon\upsilon\theta\epsilon\rho\omicron\nu$, To the Law 'tis owing, that one is in a *Free*, another in a *Servile Condition*. And therefore it is every Man's apparent Duty, who is reduced to a State of *Servitude*, either *Civil* or *Personal*, to be content with his own Condition, as the Apostle *St. Paul* teaches us, *Art*

(k) Nor is the taking up Arms upon the Account of *Liberty* justifiable in particular Persons, or a whole Community. as if to be in such a State, or a State of *Independence*, was naturally and at all Times every one's Prerogative.] See the Fourth Council of *Toledo*, and what we have above at the Fourth Chapter, and Fourteenth Section of this Book

thou called, says he, being a Servant, care not for it, 1 Cor. vii. 24.

XII. 'Tis unjust likewise to bring under Subjection by force of Arms, such as we may fancy are fit for nothing else, or (as the *Philosophers* sometimes stile them) are *Slaves by Nature*; for I must not *compel* a Man even to what is Advantageous to him. For the *Choice* of what is *profitable* or *not profitable*, where People enjoy their Senses and their Reason, is to be left to *themselves*, unless some *other* Person has gain'd any Right over 'em. But that of *Infants* is a quite different case, who, because of the *Imperfection* of their *Judgment* they are not allowed the management of their *own* Affairs nor to act as they please, should be committed to the Care of Persons proper and well qualified for such a Charge.

XII. And the desire of Ruling others against their Wills, under pretence of its being their Interest to be govern'd by 'em.

XIII. 1. I should not here have observed the Vanity of the Title with which some have dignified the *Roman Emperor*, as if the Right of governing the most distant and undiscovered Parts of the World was his, had not *Bartolus* (who for a long time was the most celebrated *Civilian*) presum'd to declare that Man an *Heretick*, who should dare to deny it; because, forsooth, the *Emperor* does sometimes (1) stile himself *Lord of the Universe*; and because that the *Empire* (m) (to which modern Historians have given the Name of *Romania*) is in Holy Writ (n) call'd by the Name τὸ οἰκουμένους of

XIII. The Roman Emperor has no Claim to Universal Monarchy, tho' some give him that Title:

P P 3

(i) *Style himself Lord of the Universe.*] As in the Council of Calcedon. Act. on xi. xii.

(k) *To which modern Historians have given the Name of Romania.*] As *Athanasius* does too in his Letters ad *Solitarios*; and that was scarce the Sixth Part of the then known World.

(n) *Call'd by the Name τὸ οἰκουμένους of the World.*] Philo de legatione, τῶν πλείων &c. I am speaking of many, and those the most

of the *World*; which is no more than such Strains and Flights as

*The whole World to Rome's Victorious Arms
Subjection already pay'd,*

Luke ii. 1.

and many such others by way of *Complexion*, *Hyperbole*, or *Eminence*; especially if we consider that in the same Sacred Pages, (o) *Judæa* alone has frequently the Name of the *World* given it. And in this Sense we are to apprehend that old Expression of *Jerusalem's*, being situated (p) in the *Middle* of the *Earth*, that is of the Land of *Judæa*: So *Delphos* being in the *Centre* of *Greece*, is called the *Navel* of the *World*. Nor is the Arguments used by *Dantes* for the Universal Jurisdiction of the *Emperor*, drawn from its Tendency to the *Interests* of *Mankind*, at all convincing; for the Advantages he proposes there would scarce be an Equivalent to the Inconveniences of such an Affair. For as a *Ship* may be built to so vast a Bulk, as to be *unweildy*, and *not manageable*, so an *Empire* may be extended over so great a Number of Men and Places so widely distant from each other, that the Government of it becomes a Task, to which no one Sovereign can be equal.

2. But however, *allowing* what he contends for, the *Expediency* of such an *Universal Monarchy*, yet the *Emperor's* Right to it cannot be thence *inferred*.

most necessary Parts of the habitable World. such as a Man might, by way of *Eminence* very well call a *World*, being bounded with two such Rivers as *Euphrates* and the *Rhine*.

(o) *Judæa* alone has frequently the Name of the *World* given it.] St. Jerome. This Word the *Earth*, tho' the Particle *All* be added to it, must be restrained to that Country the Discourse is of.

(p) In the middle of the *Earth*, that is, of the Land of *Judæa*.] You may learn this from *Josephus's* third Book of the *Jewish War*.

ferred. For *Consent* is the Original of all Right to Government, unless where it is inflicted as a *Punishment*. Neither can the *Roman Emperor* now lay any Claim to all the Dominions of his *Predecessors*, many of which, as they were acquired in *War*, so were they lost by *War*. Some have been alienated by *Contract*, and others by *Abdication* (q) are become subject to other *Potentates* and *Nations*. And some Communities that once were entirely subject, are since become so only in some *Particulars*, or made a sort of *Confederates* on *Unequal* Conditions. For all these Methods of losing, or exchanging a Right, hold equally good against the *Roman Emperor*, as against any other *Proprietor*.

XIV. I. But some there are, who would confer on the *Church* a Power over the Inhabitants of the *undiscovered* Parts of the World, whereas St. Paul openly declares, that he had no judicative Power where *Christianity* was not embraced. For what (says he) have I to do to judge them that are without? and this Power of the *Apostle*, tho', after its manner, it belonged to *earthly* Things, yet was it of a *Celestial* (if I may so say) not of a *Terrestrial* Nature, I mean, not to be exerted by *Arms* and *Whips*; but by the *Word of God* delivered to all in general, and then apply'd to particular Circumstances; by *administring* or *refusing* the *Sacraments*, which are the *Seals of the divine Grace*, as it was proper and most expedient; and lastly by a

XIV. Nor
the Church
as others al-
lege.

P p 4

Ven-

(q) Are become subject to other Potentates and Nations.] Take an Instance of this in Spain, about which see Gomezius in § fuerat. n. 5. de actionibus. Panormitanus in c. venerabilem. col. 9. de electione. Jason in l. cunctos Populos. col. 2. c. de summa Trinitate. Menochius conf. ii. n. 102. Cardinal Tusch. pract. Concl. 345. §. Rex Hispania. Molineus in Conf. Paris, in pr. n. 20. Chassaneus de Gloria Mundi, Part. v. Confid. 28. Azorius Institut. moral. l. ii. c. 5. p. 2.

Vengeance not *Natural* but *above* the *Power* of *Nature* and therefore derived from *God*, as is manifest in the Punishment of *Ananias*, *Elymas*, *Hymeneus*, and *others*.

2. *Christ* himself, from whom all *Ecclesiastical* Power is derived, who was a Pattern for the Church to walk by, declared that *his Kingdom* was not of *this World*, that is not of the same Constitutions with other *earthly Kingdoms*, adding that if it were, he like other *Princes* should make use of *Soldiers*. And were he now to demand any *Legions* they would not be *Legions* of *Men*, but of *Angels*, Mat. xxvi. 53. And what-ever he did by the Light of his *Power*, he did it not by *Virtue* of his *Humanity*, but his *Divinity*, even then when he drove out of the *Temple* the *Buyers* and *Sellers*. For the *Scourge* which he then used, was not the *Instrument*, but only the *Symbol* of *God's Wrath*; as at another time the *Spittle* and the *Oil* was not the *Salve* but (r) the *Token* of the *Cure*. St. *Austin* upon the forementioned Passage of St. *John* breaks forth into these passionate Expressions: Give ear O ye *Jews* and *Gentiles*, *circumcised* and *uncircumcised*, attend to what I say, all ye *Kingdoms* of the *Earth*; (s) your *Dominions* here below I do not interrupt, for my *Kingdom* is not of *this World*. Disturb not yourselves with *imaginary Terrors*, as *Herod the Great* did when he received the *News* of *Christ's Birth*, who was severer through *Apprehension* than *Rage* when he caused so many *Infants* to be destroyed, in hopes that *Jesus* might

(r) *The Token of the Cure.*] *Abulensis* explains this admirably well upon Mat. ix.

(s) *Your Dominions here below I do not interrupt.*] *Hilarius Arelatensis*: For *Christ* did not come to invade another's *Glory*, but to bestow his own: not to seize on an *earthly Crown*, but to confer an *Heavenly* one.

might be among them. My Kingdom (says he) is not of this World: What would you have more, come and partake of the Kingdom which is not of this World: Draw near unto me by Faith, and let not your Fears transport you to Cruelty.

3. St. Paul among his other Charges gives this for one, that a Bishop be no striker. (t) And St. Chrysostom says that it is for Kings and not Bishops, ἀνάγκη κρατεῖν to rule imperiously or by humane Force and Compulsion: And in another Place, we have no Power given us to restrain Men from sinning by the Authority of a Sentence, that is such a Sentence as implies an Execution belonging to a King or Military Officer, (u) or that breaks in upon and destroys any

(t) And St. Chrysostome [says] His Words are in his Second Book de Sacerdotibus, μάλιστα μὲν ἐν τοῖς χειρισμοῖς &c. 'Tis by no Means allowable for Christians to reform Offenders by Force and Violence. The secular Judges indeed, when they get Malefactors under their Jurisdiction, exercise a large Power over 'em, and make 'em, whether they will or no, leave their Manners off: But as for us, we are to better People by Persuasion, and not by Compulsion. The Laws give us no such Authority to restrain Criminals; or if they did, could we put it in Execution, because God does not crown those who by Necessity abstain from their Vices, but who do it out of Choice: And therefore, there is a great deal of Art and Industry to be used by us, that they who labour under such Distempers may voluntarily apply themselves to the Clergy for a Cure. And presently after, ἐν δὲ ἐλκύσαι &c. For we must not drag him by Force, nor necessitate him by Fear. And upon Ephes 4. εἰς διδασκαλίαν &c. Our Business is to teach and instruct, not to command and govern; but to persuade and advise: Now he who offers his Advice says what he pleases, he does not compel his Hearer, but leaves him to his own Liberty and Discretion of following his Advice or not. St. Ambrose lib. ii. de Cain & Abel. c. 4. The Priest indeed tells the Man his Duty, but he exercises no Power and Authority over him. This is cited c. Verbum de poenitent. distinct. 1.

(u) Or that breaks in upon and destroys any human Right.] For it belongs to Princes and not to the Church, to determine about Estates. c. Novit. de Judiciis, de Feudis, de Possessionibus. c. Causam quam inter qui Filii sint legitimi. For Kings allow no Superior in Temporals. c. per venerabilem, as before, Christ would have Christian Emperors

any human Right. And he says, that a *Bishop discharges the Duty of his Function, not by Constraint but by Perswasion*. Now from what has been said, it is evident that *Bishops, as such, can exercise no humane Authority*. (x) *St. Jerome* comparing a *King* and a *Bishop* together, says, that *the one presides over Men whether they will or no; but the other has none but voluntary Subjects*.

4. Whether *Christian Kings* can make War against those who reject the *Christian Religion*, by way of Punishment, has, as far is requisite to the present Purpose, been already discussed in a former Chapter concerning *Punishments*.

XV. I'll

be beholden to the Clergy for what regards an Eternal Life, and the Clergy to make Use of the Emperor's Laws in what concerns their temporal Affairs, that so our spiritual Proceedings might have no Clashing and Interfering with those that are Carnal, and that he who is engag'd in the Service of God might not be involv'd in secular Matters. c. quoniam distinct. x. and c. cum ad verum distinct. xcvi. Not foreign to this is what we laid down in the last § of the Second Chapter of the First Book, from the Eighty second Apostolical Canon, and several other Passages there both in the Text and Notes upon that Subject.

(x) *St. Jerome*.] And in his Epitaph *Nepotian*. A Bishop has a much less Power than a King, for the one presides over Men whether they will or no, but the other has none but voluntary Subjects; the one terrifies 'em into Submission, the other is himself design'd for Service. *Cassiodore* l. xi. in Epitt. ad Episcopos. Let the Bishop by his Instructions leave no Room for the Judge to punish. The Emperor *Frederick the First* in *Gunther's* *Ligurin*. speaking of the Pope, delivers himself thus:

Let him to his Church his Laws dispense,
O'er that bear Sway: but let Him to Us
The Sword and Sceptre leave.

When *William* Bishop of *Roschild* refus'd *Sueno* King of *Denmark*, who stood excommunicate, Admittance into his Church, by opposing his Crozier against him, and the King's Officer upon this, clasp'd their Hands on their Swords, he did as a Bishop ought to do, and offer'd 'em his Neck. Add to this what we had above in the 4th Chapter of the First Book.

XV. I'll here give this Caution, and 'twill be somewhat necessary too, because, by comparing Things present with Things past, I foresee a great Mischief like to ensue, if not guarded against. The Caution's this, that (y) *the Hopes we conceive from the Explication of some Divine Prophecies, can be no just Cause for our declaring War.* For besides that (z) *there can no certain Interpretation be made of such Prophecies as are not yet accomplished, without the Spirit of Prophecy, the Times of the accomplishment of those Things that are ever so certain may be unknown to us.* Nor does the Prediction at all, unless there be along with it an express Command of God, give any Right, since God often

XV. Nor a Desire of accomplishing Prophecies without a Commission from God.

(y) *The Hopes we conceive from the Explication of some divine Prophecies.*] See Zosimus and Ammianus Marcellinus, about one Theodora in Gratian's Time; and Procopius Persic. ii. and Leunclavius Hist. Turcic. l. xviii. about John of Cappadocia.

(z) *There can no certain Interpretation be made of such Prophecies as are not yet accomplish'd, without the Spirit of Prophecy.*] For the Books of the Prophets are closed up and sealed till the Time of the End, so that they cannot be understood, Dan. xii. 4. 8. 9. St. Jerome upon Daniel. *If the Prophet heard and did not understand what will they do who presume to declare what's contain'd in that seal'd Book; a Book involv'd in numerous Obscurities till the Time of its Consummation?* Procopius Goth. c. ii. τῶν γὰρ Σιβύλλης &c. I think it impossible for any Man to find out the Meaning of the Sibyls Oracles before the Thing be Fact. And presently, ταῦτα τε ἀνόητα &c. 'Tis impossible for any Man living to understand the Sibylline Oracles before their Accomplishment; for 'tis Time alone which upon the Arrival of the Affair is self, and the Conclusion of what is predicted, can exactly tell what the Verse intended. Gregoras l. v. ἀλλ' ὥστε &c. But as other Predictions are very difficultly guess'd at and expounded, because they have a Thousand Intricacies and various Explications till their actual Expiration, so this Oracle too deceiv'd many, and even the Emperor Andronicus himself till his Decese, as it shall be related by and by. But when he was dead and gone, the Oracle discover'd it self. Have a Care then you who are Divines, that you be not too bold this Way: And do you who are Politicians have a Care, that you be not impos'd on by such presumptuous Theologists. There's a Passage very well worth your viewing in Thuanus, l. lxxix. at the Year 1583, about one Jacobus Brocardus.

XVI. Nor
a Debt not
due in strict-
ness of Ju-
stice, but
by some o-
ther Way.

ten permits his *Predictions* to be brought to pass by wicked Men, or by wicked Actions.

XVI. This we are also to understand, that if a Man owes another any thing, not in Strictness of *Justice* but by some other Virtue, suppose *Liberality*, *Gratitude*, *Compassion* or *Charity*, he cannot be sued for it in any *Court of Judicature*, neither can *War* be made upon him on that Account; for to either of these 'tis not sufficient, that that which is *demanded* ought for some moral Reason to be perform'd, but besides it is requisite we should have some *Right* to it, such a *Right* as both *Divine* and *Humane* Laws do sometimes give us to those Things which are due by other Virtues; and when that is so, there arises a *new* Obligation which now belongs to *Justice*. But when this is *wanting*, the *War* on that Account is unjust, as was that of the *Romans* against the King of *Cyprus*, for his *Ingratitude*. For he who has done a *Kindness*, has no *Right* to demand a *Return* of his *Favour*: For if so, it would be a *Bargain* and not a *Kindness*.

XVII. The
Distinction
between a
War whose
Cause is un-
just, and
that which
is Faulty
in some o-
ther Re-
spect; and
the diffe-
rent Ef-
fects of both.

XVII. 1. We are also to take Notice, that it often comes to pass, that tho' there be a *just Cause* for *War*, yet some Fault may accompany the *Action* from the *Intention* of the *Agent*, as when something else, not of it self unlawful, does more powerfully incite us, than the *Right* we have to do it, as (a) *Ambition*, for Instance, or some *Advantage* either *private* or *publick* that's expected to accrue to

(a) *Ambition*.] Which Vice, the most of any, flatters us with a certain Resemblance of Virtue. But St. *Austin* in his third Book *de Civitate Dei*, and at the ninth Chapter, very justly gives it as his Opinion, That it is much better to suffer for our Incapacity that Way, than to acquire a Reputation by employing our Arms in such a Manner. Look back again for what we set down out of *Agathias*, at the third § here.

to us from the *War*, considered distinctly from the *justifying* Cause of it, or when some unlawful *Passion* arises in us, as the taking a Satisfaction in another's *Ill*, without *Regard* to any *Good*. Thus *Aristides* tell us, that the *Phocians* were deservedly destroyed, but that King *Philip* did very ill in so doing; because he put them to the *Sword*, not for *Religion*, as he pretended, but on account of enlarging his *Dominions*.

2. *There is one, and that a very ancient Reason for making War*, (says *Sallust*) *and that is a profound desire of Empire, and Riches*. In *Tacitus*; *Gold and Wealth* were ever the chief motives for *War*. And in the *Tragedy* you have:

*Rash Anger and Gain's impious Frenzy
Have broke the Alliance off.*

Whereunto we may refer that of *St. Austin*: *A pleasure in doing Mischief, a restless and implacable Spirit, a savage Delight in Blood, the Lust of Dominion, and such like are justly culpable in all Wars*. But though these Things are Criminal, yet when the *War* is grounded on a *Justifiable Reason*, they do not render it *Unjust*, and therefore there is no *Obligation* to make *Restitution* for *Damages* sustained by such a *War*.

CHAP. XXIII.

Of the dubious Causes of War.

I. **W**HAT *Aristotle* says, holds very true, that we cannot expect the same Degrees of Evidence, in *Morals*, as in *Mathematical Sciences*, because *Mathematicians* consider *Forms* abstrately from *Matter*, and *Forms* themselves are generally such

I. From
whence
Causes of
doubt in
Moral Mat-
ters proceed.

such (a) as will not admit of any *Mean*, as between *strait* and *crooked* there is nothing of a *Medium* to be found; but in *Ethics* the least Circumstances alter the *Matter*, and the *Forms* we are speaking of (b) have commonly some *Mean* coming between 'em, and of such an Extent, that they sometimes draw nearer to this, and sometimes to that *Extream*. So between what we *ought*, and what we are strictly *prohibited* to do, there is a *Medium* which it is lawful for us to venture upon, but it approaches sometimes nearer to *one*, sometimes to the *other* Extream; whence we are often at a stand to know, *which* of the Extreams it has the *nearer* Alliance to, as in a *Twilight*, or *Luke-warm Water*, and this is what *Aristotle* says, ἐστὶ χαλεπὸν &c. 'tis often difficult to judge which side to take. *Andronicus Rhodius* carries the Point thus far, τὸ κατ' ἀλήθειαν &c. it is hard to distinguish what is really just, from what appears to be so.

II. We are to do nothing against our Conscience, though it be Erroneous.

II. 1. But this we are first to take notice of, that though an Action be in it self Lawful, yet if upon weighing all its Circumstances, he who performs it is of Opinion that it is *Unlawful*, that Action is *vicious* and *bad*; and this is what *St. Paul* means in asserting, that *whatsoever is not of Faith is Sin*; (c) in which Passage *Faith* is taken for the *Judg-*

(a) As will not admit of any Mean.] In this Sort of Forms, the Change is made εἰς τὸ ἀντικείμενον to the Opposite, in others, εἰς τὸ μετὰξὺ. to the Medium.

(b) Have commonly some Mean coming between 'em.] See *St. Chrysostom* upon *Ephes. iv. Moral 2.*

(c) In which Passage, Faith is taken for the Judgment.) To the same Purpose are the following Expressions in that very Chapter of that Epistle of *St. Paul*, ἕκαστος ἐν τῷ ἰδίῳ νοὶ πληροφορεῖσθω, Let every Man be fully persuaded in his own Mind. And μακάριος ὁ μὴ κρίνων ἑαυτὸν ἐν ᾧ δοκιμάζει, Happy is he that condemneth not himself in that Thing which he alloweth. *St. Ambrose*. Whatever is done contrary to the Approbation of the Judgment, is Sin. The next is *St.*

Judgment which a Man passes upon a Thing; for God has given us a *distinguishing* Power, called *Conscience*, conformable to whose Dictates we are to square our Actions, and whenever we neglect and contemn its Suggestions, our Minds degenerate and become *Brutish*.

2. But it often comes to pass, that the *Judgment* can afford no *Certainty*, but hangs in *Suspence* and *Doubt*, which if, upon thorough Consideration, we cannot be satisfied in, *Cicero's* Directions will not be amiss, (d) who forbids us to *do any Thing, the Legality of which we question*. The *Hebrew Rabbins* give us this Caution, *forbear what is doubtful*; but this Advice cannot take place, when a Man is as it were forced to do one or t'other, and yet doubts of the *Lawfulness* of either; for in that Case he is to chuse the safer side, that which he thinks to be least *offensive*; for at all Times when we are under a *Necessity* of chusing, then the *lesser Evil* puts on the Form of *Good*; τὰ ἐλάττωστα &c. of two Evils we must take the least, says *Aristotle*; and *Cicero* advises the same; and *Quintilian* tells us, that if we compare Evils together, the smaller holds the Place of a Good.

III. But in *doubtful* Points, generally speaking, when the Mind has made some Examination, it does not hover any longer, in a *Suspence* and *Equilibrium*, but is drawn to one side or t'other, (e) by Arguments deduced from the Thing it self, or

by

III. That our Resolutions are determin'd by Reasons drawn from the Thing it self:

St. *Austin*. they are both quoted by *Gratian* after Chap. xiv. *Caus.* 28. *Quest.* 1. Not very foreign to this is that of *Plutarch* in his *Timo-leon*, δὲ καὶ μόνον &c. For an Action must not only be good and just in it self, but the Perswasion upon which it is grounded must be firm and constant, that so we may do it out of Principle and Conviction.

(d) Who forbids us to do any Thing, the Legality of which we question.] *Pliny* l. i. *Epist.* 19. Never do what you make any Scruple of.

(e) By Arguments deduced from the Thing it self, or by the good O-

pinion

by the good Opinion it entertains of other prudent Men, who have declared themselves upon that Affair. For there (f) that Saying of *Hesiod* is verifi'd, 'tis a very excellent Quality to have a clear Head of his own, and next to this, is to be willing to follow the good Advice of another. As for the Arguments deduced from the Thing it self, they are taken from the Causes, the Effects, and other Circumstances.

IV. Or by
the Authority
of others.

IV. 1. But for our right Understanding of these Things, some Address and Experience are absolutely necessary; and those who want these Qualifications must listen to the Directions of *Wiser Men* in order to regulate and inform their Judgment.

[*pinion it entertains of other prudent Men.*] *St. Austin* lib. 3. de Ordine. When the Obscurity of an Affair perplexes us, here are two Ways for us to go, either to follow our own Reason, or some other's Authority. This is explain'd by *Gabriel Vasquez*, Disput. lxii. c. 3. n. 10.

(f) That Saying of *Hesiod*.] *Minutius* made Use of it in *Livy*, l. 22. after a very unsuccessful Battle. The most valuable Man is he, who can himself advise what is proper and convenient: The next is he who complies with what somebody else directs him to. But he who can neither advise himself, nor is willing to follow any other's Direction, is a foolish Wretch indeed. And *Tully* pro *A. Cluentio*. All the World allows him to be the wisest Man, who can himself think upon what is necessary and expedient; and that the next to him is the Man, who is glad to submit to the good Contrivance of any Body else. *Hesiod's* Verses that gave Rise to these Reflections, are as follows:

Οὗτος μὲν πανδπίος &c.

None equals Him, whom an happy Genius
And his own great Parts for any Occurrence fit;
Who weighs each Circumstance, and wisely knows
What's in ev'ry Case and to ev'ry Purpose best.
The next is He, who glad Submission pays
To th' good Directions of some prudent Friend.
But He, who doubtful stands, not qualify'd
Himself to Argue, and too proud to hear
What others offer, is an useless Wretch,
And lives in vain.

Judgments. For according to *Aristotle* Things are *Probable*, when *all the World* agree to 'em, or the *Generality of the World*, or at least the Men of *Wit* and *Penetration*; and again, when either *all* these Men of *Wit* and *Penetration*, or the *Majority* of 'em, or however the *most Eminent* agree to 'em. And this way of judging is what *Princes* chiefly make use of, who can hardly afford Time enough to go to the Bottom of Things and search out all the *Principles* on which they are founded:

Σοφοὶ τὸ ἐξ ἁννὸι τῶν σοφῶν συνεία.

Princes are from their Conversation Wise.

Aristides in his Harangue to the *Rhodians* about *Concord* tells 'em, that, as when a *Fact* is in dispute, that which has the greatest Number of, and those the most credible *Witnesses* to assert it, is held for Truth, so where *Opinions* are different, those are the safest to be entertained and followed, which rely upon the Authority of the most *able* and *judicious*. Thus the old *Romans* first advised with the College of *Heralds* before they declared War against any Nation, and the *Christian* Emperors seldom or never undertook one without consulting their *Bishops*; to the end that if there was any Thing that could raise any *Scruple* of Religion, they might be warned and advertised of it.

V. r. But it may happen in several *Controversies*, that the Argument on both sides may seem probable, as well from the *Reason* of the Thing it self, as from the *Authority* of others, and when it so falls out, if the Cases in Question be *inconsiderable* and of indifferent Concern, either side may be adhered to, without any great danger, and the Judgment be blameless. But if the Matter in

V. If a scruple arise in a matter of Importance, on both sides of the Question, and we are obliged to determine one way or other, we must choose the safest Resolution.

hand be of great Moment, such as the putting a Man to Death, then on account of the vast difference between the two Resolutions, (g) the safest side is preferable, according to the usual Saying,

If you must Err, Err as little as you can.

And therefore it is more equitable to acquit a Criminal, than to condemn the Innocent.

2. The Author of those Problems that go under Aristotle's Name, says *ἐκαστος ἡμῶν* &c. There is none of us all, who would not sooner clear the Guilty, than condemn the Innocent; and he adds this which we have mentioned before as his Reason, *ἐστὶ γὰρ* &c. For when a Man is in a doubt, he is to chuse that side where there's the least hazard run. Parallel to this is the Saying of Antiphan, *εἰ δέοι* &c. If we must do amiss, it is better to Pardon though unjustly, than to condemn wrongfully; for by the former we are only Guilty of a Mistake, by the latter of a horrid Crime.

VI. Whence it follows that we are not in such a Case to declare for War.

VI. Now War is a Matter of the weightiest Importance, and by it the Innocent suffer a great many Afflictions, and therefore Peace should be the End that all our Councils ought to aim at. Fabius is on this Account much commended by Silius Italicus, who gives the following Character of him:

*With Caution he proceeds and wisely weighs
Each future Hazard; thus he nor eager
Nor forward is for slight uncertain Wrongs
To rouse up Bloody Mars.*

(g) The safest Side is preferable.] Ammianus Marcellinus. l. xvii. If Passions and Resentment be implacable, 'tis the Height of Severity, but if Intreaties can prevail, there 'tis the Height of good Nature; which indeed, as in all Cases of Ill and Misfortune, ought so to be made Choice of before Severity. And this Vasquez expounds in his aforesaid Book, 4. 2. 21,

And there are three Ways whereby Misunderstandings among Princes may be accommodated without a War.

VII. 1. The First is by a Conference: There being two sorts of Disputings in the World, says Cicero, the one by Reason, the other by Force, that agreeable to the Nature of Man, and this to Brutes, we ought never to have Recourse to the latter, but when we cannot redress our Grievances by the former. A Man of Prudence and Discretion, says Terence, (b) would try every Method rather than that of Compulsion; how do you know but that he may do it without any Force at all. Apollonius Rhodius speaks to the same effect, *μὴ δ' αὐτῶς &c.* Try first with Words, before you go to Blows; and Euripides,

VII. For this may be avoided by a Conference.

Λόγισι πᾶσι εἰ ὅ μὴ, βία δ' ὀργῆς;

I'll do it by Words; if not, by Force of Arms.

And in his Supplikes he blames the Cities that neglected this means of Accomodation.

Q q 2

What

(b) Would try every Method rather than that of Compulsion.] Dionysius Halicarnassensis, in Exc. legat. *μὴ πρότερον ἀρχῆαι &c.* We must not proceed to Deeds before we have try'd what Words can do. And Menelaus in Libanius, *πρῶτον λόγῳ &c.* For 'tis more agreeable to human Nature, to attempt by Reason and Argument to have Justice done one, than immediately to fly to Arms. Not very different from this are those Reflections of the Chorus in Euripides's Helena.

τὸ θεῶν

ἔπος ἀλυστὲς εὖρον,

ἄφρατες &c.

What the Gods say I always found was Truth.
For none but Fools and Madmen e'er would seek
Or Rest or Virtue from the bloody Point
Of Sword and Spear: For if human Miseries
By these could be determin'd, War and Contention
Would every City, every State infect.

*What Words alone might easily decide
You to the Sword's Determination leave.*

And Achilles in his Tragedy of Iphigenia at Aulis :

*If he submits to Justice you've no need
Of my Assistance, you are then secure,
And I the Favour of my Friend preserve :
Nor can the Army blame me if I gain
My Point by Reason rather than by Force.*

The very same we read in Euripides's Phœnisæ.

Πάν γ' ἔξαιρε λόγῳ
Ὁ κ' σιδήρεος πολέμιων ἐράσειεν ἄν.

*For all the Hostile Sword can do,
By Conversation's done as well.*

*Pbanéas in Livy makes this Improvement of it, (i)
Men for preventing of War do allow of several Things
which by force of Arms they could not be compell'd to
And Mardonius in Herodotus's Polymnia taxes the
Greeks upon this score : τὰς χερῶν &c. Whose Du-
ty it was, since they were of the same Language, to
have endeavour'd to compose their Differences by the Me-
diation of Embassadors, rather than by the Point of
their Swords.*

2. Coriolanus

(i) Men for preventing of War do allow of several Things, which Force of Arms they could not be compell'd to. Donatus ad Eunuchum For 'tis an Observation almost to a Proverb. That what a Man will stand up for, and maintain with all his Might and Main when you would force it from him, he will generously part with, when you quit your Pretensions.

2. *Coriolanus* in *Dionysius Halicarnassensis*, says τὸ μὴ &c. If any Body without desiring what's another's Property, only sues for his own, and being not able to obtain it does thereupon declare War, all the World will acknowledge that War to be just. King *Tullus* in the same Author maintains, that what cannot be accommodated by fair Means must be decided by foul ones. I must profess, says *Vologeses* in *Tacitus*, I had rather keep the Conquests my Ancestors have left me, by the Justice of my Cause, than by Blood and the Force of Arms. And King *Theodorick* takes Notice, that 'tis then only our Interest to run to Arms, when we cannot otherwise have Justice done us by our Enemies.

VIII. 1. The Second way to prevent War between those, who, not belonging to the same Jurisdiction, have no common Judge to appeal to, is (k) to put the Matter to Arbitration: ἐν ἡμῶν δὶκῶν &c. says

Q q 3

(k) To put the Matter to Arbitration.] A Method indeed generally slighted by the more Potent. See *Comestagius* about the Union of the two Crowns of *Castile* and *Portugal*; but this is a Way very well worth being insisted on by those who have any Regard to Justice and Peace. Several great Princes and People mentioned in the Text, have done it. Let us subjoin a few more. The Contest between *Magnus* and *Canutus*, Kings of *Norway* and *Denmark*, each of 'em laying Claim to both Crowns, was put to Arbitration: Just as *Julius*, the First of that Name, would have done with *Severus*, who disputed with him the Roman Sovereignty. *Magnus* King of *Sweden* was chosen Umpire between the two *Ericks* Kings of *Denmark* and *Norway*. Five *Spartans*, *Critclaidas*, *Amompharetus*, *Hippobidas*, *Anaxilas*, *Cleomenes* were elected Judges of the Controversie of the *Athenians* and *Megarenses* about *Salamis*. In the Treaty of the *Lacedemonians* and the *Argives* in *Thucydides* v. δίκας δὶ δόξας καὶ ἀνὰ κράτος, willing, as the Custom of their Ancestors was, to compromise the Matter. And again, εἰ δὲ τῆς τῶν &c. If any Dispute should happen between two States in Alliance, let them refer their Cause to some other State that's indifferent to 'em both. You have both these Passages in *Thucydides* I. v. Several People independent of the Roman Empire, to avoid entering into Wars, took *Marcus Antoninus* for the Arbitrator of their Controversies. *Victor* and others take Notice of this. In *Procopius Gothic* iii, the *Gepida* say to the *Lombards*,

VIII. Or by Arbitration; where of the Duty of Christian Kings in respect of the Parties at War.

δίκας

says *Thucydides*, 'Tis barb'rous and abominable to fall upon him as an Enemy, who is willing to put his Case to Reference. So *Diodorus* relates that *Adrastus* and *Amphiaras* submitted the Determination of the Crown of *Argos* to the Judgment of *Eriphyle*. Three *Lacedemonian* Umpires were chosen between the *Athenians* and *Megarenses* to settle the Right of the Iland of *Salamis*. The formentioned *Thucydides* tells us that the *Corcyreans* notify'd to the *Corinthians*, that they were ready to refer the Matter in Controversie to the Cities of *Peloponnesus*, and to allow what they should agree upon. And *Pericles* is extolled by *Aristides*, that for the Prevention of a War *Διὰ &c.* he offer'd to refer himself. And *Isocrates* in his Oration against *Ctesipho*, reckons this amongst King *Philip's* Commendations, That he was ready to refer the Differences which he had with the *Athenians* to any disinterested and impartial State.

2. Thus did the *Ardeates* and *Aricinians* formerly, and after them the *Neapolitans*, and *Nolans*, who submitted all their Matters in Dispute to the Determination of the *Romans*; and the *Samnites* in their Variance with the *Romans* appeal to their
Com-

Διὰ τὸ Νεαλὺς &c. For we for our Parts are ready to have our Differences concluded by Arbitration; and 'tis by no Means reasonable to offer Violence to those who are desirous to be determin'd by a Reference. And in *Gothic*. iv. *Theodibaldus* King of the *Franks*, declares himself ready to submit his Dispute with the *Romans* to Judgment. See too what the *Romans* formerly signify'd to *Philip*, in *Polybius*, Exc. legat. n. 4. And what there is in *Antiochus's* League, out of the same *Polybius*, there in Excerpt. n. 35. The King of *England* was Judge of the Succession to the Crown of *Scotland*; and the Count *Holsatus* between the King of *Denmark* and his Brothers, as *Pontanus* relates it. *Hist. Dan.* l. vii. Add to these some Instances in *Mariana*, l. 24. c. 20, 29. c. 23. in *Paruta*, l. 7, and 11. in *Bizarus*, l. 12. *Crantzius* l. 6. *Saxonic*. c. 5, and in what we have below, B. iii. ch. xx. § xlv.

Common Allies. Cyrus refers the Point between him and the King of *Affyria* to the *Indian King*. The *Carthaginians* for avoiding a War about the Controversies with *Masinissa*, appeal to Judgment. And the *Romans* themselves, as to their Differences with the *Samnites*, (according to *Livy*) do so to those they were both at Peace with. *Philip* of *Macedon* would have his Disputes with the *Grecians* ended after the same Manner. *Pompey* allowed *Arbiters* to the *Parthians* and *Armenians*, when they demanded it, for regulating their Bounds and Limits. *Plutarch* tells us *§x. iv. &c.* That it was the principal Business of the *Roman Heralds* to take Care not to suffer their Soldiers to fight, 'till all Hopes of having Justice done them was lost. *Strabo* says of the *Druids* in *Gaul*: *§c. x. &c.* That in former Times they were the *Umpires* between Nations at War, and had often accommodated Matters upon the very Point of an Engagement. The same Author records, that the *Priests* in *Spain* did use to do the same.

3. (1) But much more are *Christian Kings* and *States* obliged to take this Method for the Prevention of *War* and *Bloodshed*; for if certain *Arbitrators* were constituted both by *Jews* and *Christians* to prevent their going to Law in *Infidel Courts*, and the same was expressly commanded by *St. Paul*, how much more should we be inclin'd to it, for the avoiding of a much greater Inconvenience, which is *War*? 'Tis from hence *Tertullian* argues

Qq 4

that

(1) But much more are *Christian Kings* and *States* obliged to take this Method.] *Gregoras* l. x. de *Alexandro Bulgaro*, in *§. xiv. &c.* saying, That it was a very indecent and unworthy Thing for *Christians* to attack one another with so much Barbarity, when they had Opportunities enough to come to an Agreement, and might employ their united Arms against the wicked and irreligious.

that *A Christian must not bear Arms, since he is not so much as allowed to commence a Law Suit*; which Expressions, as it was observed in another Place, are to be taken in a *qualify'd* Sense.

4. And for this, as well as many other Reasons, it would be not only convenient, but somewhat necessary that *Congresses of Christian States* were held, where, by them who are no ways interested on one Side or other, the Differences of contending Persons might be made up; and that some Means were *thought upon* (m) to oblige the Parties at Variance to accept of a *Peace upon fair and reasonable Terms*: And that this very Business (n) was the *Druids Employment* formerly among the *Gauls* is what *Diodorus* and *Strabo* inform us. And we read too that the *Kings of France* referred the Division of their Kingdom to their *Nobles*.

IX. Or by casting of Lots.

IX. The *Third* way to prevent War is to determine Differences (o) by *casting Lots*: Which Method *Dion Chrysostom* highly approves of in his *Second Oration in Fortunam*, and before his Time *Solomon*, Prov. xviii. 18.

X. Whether Duelling may be allowed for preventing War.

X. 1. Something like this is *Duelling*, a Custom which is not altogether to be rejected, if two *Antagonists*, (p) whose Disputes would otherwise involve

(m) *To oblige the Parties at Variance to accept of a Peace upon fair and reasonable Terms.*] See a Precedent in *Cassiodore* iii. 1, 2, 3, 4: and *Gail de Pace publica* iii. c. 18. n. 12.

(n) *Was the Druids Employment.*] The *Druids* were succeeded in this Office, and indeed by a much better Title, by the *Bishops*. See the *Bishop's Letter to King Lewis* in the Statutes of *Charles the Bald*, and *Roderic of Toledo* l. vi. c. 3. about the *Bishops of Spain*.

(o) *By casting Lots.*] See *St. Austin de Doctrina Christiana*, l. 1. c. 28.

(p) *Whose Disputes would otherwise involve a whole Country in Misery and Ruins.*] The Author of the Tragedy of *Theban*.

volve a *whole Country* in Misery and Ruin, are willing to decide the Matter themselves by the *Sword*, as *Hyllus* and *Echemus* formerly did about *Peloponnesus*; *Hyperochus* and *Phemius* about a Province near *Inachus*; *Pyræchma*, *Ætolus* and *Degmenus Epeus* about *Elis*; *Cerbis* and *Orsua* about *Iba*: For the *People* may accept of this way of Determination (tho' it may not be justifiable in the *Competitors* themselves) as being the *lesser Evil*. *Metius* in *Livy* thus addresses himself to *Tullus*, *Let us make use of some compendious way of deciding which of us shall sway the Scepter, with as little Bloodshed as possible*. *Strabo* records this as an ancient Custom of the *Greeks*, and *Aeneas* (q) in *Virgil* pronounced it justifiable, that the Matter depending between him and *Turnus* should be so determined.

2. *Agathias* in his first Book, (r) where he describes the Manners of the ancient *Gauls*, does in particular extreamly commend this Custom; his Words,

*Do you yourselves the Title to the Crown
Between your selves determine: but let not
The Kingdom by Personal Feuds be ruin'd.*

Dion in his *Otho*, πολὺν ὅς &c. For 'tis much better, and far more just, that one should fall a Sacrifice for all, than that a Multitude should perish for one.

(q) In *Virg* l.]

Turnus then should try

His Cause in Arms, to conquer, or to die;

My Right and his are in Dispute the Slain

Fell without Fault, our Quarrel to maintain. *Dryden*.

Upon just such another Account *Anthony* sent a Challenge to *Octavius*. *Plutarch* in his Life of *Anthony*.

(r) Where he describes the Manners of the ancient *Gauls*.] See a Statute of *Charles the Bald*, in *S. Arnulfus*, and the Treaty of *Aix la Chapelle*. There's the same Piece of Equity among the *Leopards*. See *Paulus Wernafred*, l. i. c. 12. iv. c. 17. v. c. 40.

Words, as being very remarkable, I shall set down at large: ἀλλ' ἐπεὶ &c. If any Difference happened between their Princes, to Arms they immediately go, as tho' they were resolv'd to have the Matter determined by the Sword; on they march, but when the Armies advance near one another, laying aside all Animosities, they agree very peaceably, and so perswade their Kings to decide the Affair by a Course of Justice: Or if they seem dissatisfy'd at that, that they would then fight it out in single Combat, and so end the Dispute at the Hazard of their own Lives: It being neither agreeable to Reason nor the Laws of their Country, that their Kings, on Account of their private Piques and Quarrells, should embroil, weaken and overturn the State. They therefore presently disband their Armies, and enjoy a free and peaceable Commerce, being perfectly reconciled. So great a Regard for Justice and such an Affection for their Country had those Subjects, so tender and condescending was the Temper of their Kings.

XI. That the Person in Possession has the better of it, where the Case is equally doubtful;

XI. But tho' in a doubtful Case both Sides are obliged to endeavour after Terms of Peace, to avoid the Mischiefs consequent upon War, (s) yet does this concern him who makes the Demand, more than him who is in actual Possession. As in all Cases of equal Claim the Possessor has the better Title, not only by a Civil, but also by a natural Right; The Reason of this has been already laid down out of Aristotle's Problems. And here we must further add, that he, who is satisfy'd in the Justice of his own Cause, but cannot produce sufficient Evidence, whereby to convince the present Occupant of the Injustice of his, cannot lawfully declare

(s) Yet does this concern him who makes the Demand, more than him who is in actual Possession.] See Herrera, Tom. ii.

declare *War*, because he has no *Right* to force his Adversary to quit his Possession.

XII. Where the Title is doubtful and neither Party in actual Possession, or both equally, there he shall be reputed the unjust Person who refuses to accept the *Half* of the Thing in Controversie, when 'tis tender'd to him.

XII. If neither be in Possession, where the Case is equally dubious, the Thing depending may be divided.

XIII. 1. From what has been premised, That much controverted Question may be easily solved, Whether War can be just and lawful on both Sides, with Respect to the chief and principal Authors of it.

XIII. Whether a War may be just as both sides, explained by several Distinctions.

(1) Here we must distinguish the different Acceptations of the Word *Just*. A Thing may be termed *just*, either from its Cause, or according to the Effects it produces. Again in respect of the Cause, either as *Justice* is taken in a particular Sense, or in that general Signification under which are comprehended all Sorts of *Honesty* and *Rectitude*. Further, this strict and special Acceptation of the Word *Just* is divided into that which regards the Action, and that which regards the Agent. For the Agent is said sometimes to act *justly* whilst he acts not unjustly, tho' that which he acts be not just, as Aristotle very judiciously distinguishes between τὸ ἀδικεῖν, and τὸ ἀδικον ποιεῖν, to do unjustly, and to do that which is unjust.

2. In the particular Acceptation of the Word, and that which answers to our present Purpose, War cannot be just on both Sides, nor can any Law-Suit be so, because there is no Moral Faculty, which from the Nature of the Thing, can admit of Contraries, as suppose to do a Thing, and to hinder the doing of it. But it may happen that neither of the Parties

(1) Here we must distinguish the different Acceptations of the Word *Just*. So Gratianus Caus. ii. Quest. 3. after c. Episcopus distinguishes the Justice of the Cause, the Order, and the Intention.

Parties in *War* acts *unjustly*. For no Man acts unjustly, but he who is *conscious* that what he does is *unjust*; and this is what many are ignorant of. So People, both *Plaintiff* and *Defendant*, may *justly*, that is, may *Honestly* and *Fairly* go to *Law*. Because Folks are very frequently unacquainted with several things, both as to matter of *Right*, and as to the *Fact* from whence that *Right* proceeds.

3. In the *General* Sense and Meaning of the Word, it bears the Name of *Just*, when the *Agent* is for his Part in no manner of Fault. For there are several *Actions* done *Unjustly*, when at the same time no *Blame* can be charged on the *Agent*, on the account of an *inevitable Ignorance*: An Instance of this we have in those who do not conform themselves to a *Law*, which without any Fault of theirs they are *Strangers* to, tho' that *Law* has been *published*, and so long too that they had *Time* enough to have been acquainted with it. Thus also it may happen in *Law-Suits*, that both Parties may clear themselves not only of *Injustice*, but of all other *Sinister Practices*; especially if the *Plaintiff* and *Defendant*, or either of them, has a Suit depending, not in his own, but in another's Name; as suppose, he be a *Guardian*, whose Business it is not to abandon any *Right* of his *Ward's*, tho' never so *uncertain*. So *Aristotle* affirms, that in *Contests* about a *Right* that is really *Disputable*, neither of the Parties is to blame, which he expresses by *wovnēgēs*, *Wicked* or *Malicious*. *Quintilian* is of the same Mind, when he says, that a *Councillor* may *honestly* plead on either side. And *Aristotle* adds, that to assert that a *Judge* pronounces a *just Sentence*, is an *Equivocal Expression*; for it may be taken either as he judges, *ὡς δέη*, *fairly as he ought*, being perfectly acquainted with the Cause in hand, or as he judges, *ὡς τὴν εἰσὶν ἡγομένην*, *According to the*

best of his Capacity, and his real Thoughts of the matter. And in another place he says, *ἐὰν ἀγνοῶν ἐκπέμψῃ ἐν ἀδίκησιν*, if he determin'd it out of Ignorance, he has not acted unjustly.

4. But in a *War* it is scarce possible, but that *Rashness* and want of *Charity* will be there, on account of the great Importance of the Affair, which is indeed of such a Nature as to require not *Reasons* barely warrantable, but the clearest Evidences in the World.

5. But if we construe the Word *Just*, as it respects some *Effects* of *Right*, it is plain that *War* in this Sense may be on both sides *Just*, as 'twill be made out by what we shall lay down by and by in our Discourse of a *Publick Solemn War*. In the same manner as a *wrong Sentence*, and an *unjust Possession* have some *Effects* of *Right*.

C H A P. XXIV.

Exhortations *not Rashly to engage in a War,*
tho' for just Reasons.

I. I. **T**H O' it be somewhat foreign to the Matter in hand, which is designed only to treat and discourse of the *Right of War*, to demonstrate how far other *Virtues* direct and encourage us to undertake it, yet by the way we must obviate a certain *Mistake*, lest any one should be persuaded, that whenever he has a *just Cause* given him, he is thereupon immediately obliged to declare *War*, or that 'tis warrantable at any time for him so to do. On the contrary, it happens that 'tis commonly a greater Piece of Goodness and much more commendable to *abate* somewhat of our *Right*, than rigorously to pursue it. For we observ'd

I. We are often to abate of our Right for avoiding a War.

observ'd above in its proper place, that we may very justly hazard our own Lives to secure another's, or to promote as far as in us lies his *eternal Salvation*. And this Duty obliges us *Christians* most of any, who therein follow the exact Pattern of *Christ*, who laid down his Life for us, while we were yet *Sinners and Enemies* to him, Rom. v. 6. which Instance should much more excite and direct us not to be so eager in pursuing our *Rights* to that Degree, as to force others to all those *Inconveniences* and *Mischiefs* which *War* is attended with.

2. 'Tis the Advice of *Aristotle* and *Polybius*, that (a) we should not make *War* on every such Account. *Hercules* was condemned by the Ancients for declaring War against *Laomedon* and *Augeas* for not paying him for his Labour. *Dion Pruseensis* in an Oration of his about *War* and *Peace*, says that this was not the only Question, εἰ οὐκ ἐβλήθη &c. Whether any Injury was received from them we intend to make *War* on, but also, of what Importance the Injury offered us was.

II. 1. There

(a) We should not make War on every such Account] *Seneca* *Suafior* v. *Gallio*, said, That we ought to engage in War for the Defence of our Liberty, our Wives and our Children; but that we ought not to do so for any trifling Matter, or for what, if it did happen, could not hurt us. *Apollonius* said something more to the King of *Babylon*, πρὸς τὸν βασιλῆα &c. He added, says *Philostratus*, l. 23. that one should not differ with the Romans for a few small Villages, much larger than which some private Men often possess, and that one should not even for greater Matters commence a War against 'em. *Josephus* in his second Book against *Appian*, speaking of his Country-Folks, εἰς τὴν ἀνδραγαδίαν &c. Nor do we exercise our Courage, or enter into Wars out of Avarice and Ambition, but for the Security and Preservation of our Laws; and therefore, tho' other Damages we bear with Abundance of Patience, yet if once they attempt to force us to recede from our Constitutions, we then even beyond our Strength betake us to our Arms, and will maintain 'em to the last Extremities.

II. 1. There are indeed several Reasons to dissuade us from Punishing. We may observe, how many Offences Parents will connive at, and overlook in their Children: On which Topick Cicero has a Discourse in Dion Cassius. A Father (b) (as Seneca says) will not disinherit his Son, unless the Provocations given be so many and so intolerable as to overcome his Patience, and unless he foresees more heinous Crimes like to ensue than those which he has been already guilty of. Much to the same purpose is Phineus's Saying, which Diodorus Siculus records, μηδ' ἐνα πατέρα &c. No Father willingly brings his Son to Punishment, unless the Greatness of his Fault exceeds the Natural Affection of Parents to their Children; and that Saying of Andronicus Rhodius imports as much, ὁδὲς πατὴρ &c. no Father casts off his Son, unless he be notoriously wicked.

2. But whoever he be who goes about to punish another, (c) does, as it were, personate a Governor,

II. Especially when that Right consists in inflicting Punishments.

(b) As Seneca says.] De Clementia. i. c. 14. St. Austin sitting in Court with a Father, upon the Tryal of a Son who was detected in his intended Parricide, said, That he should be banish'd whither his Father thought fit: He did not sentence him to the Sack, the Serpents, or a Prison, not so much regarding whom he was to give his Judgment against, as him he was upon the Bench with, alledging, That a Father ought to be satisfied with the gentlest Kind of Punishments. Which are the Words of Seneca in his same Book. c. 15. Terence in his Andria, A small Punishment for a great Fault will serve a Father's Turn. Philo παρὰ εὐφρονας says, πατέρας &c. Fathers disinherit their Sons, cutting 'em off from their Family and Kindred, but not till their Wickedness has quite prevail'd over that excessive Affection Nature implanted in 'em. And Cicero pro Ligario, Gentlemen, pray pardon him, 'twas a Mistake of his, he happen'd to trip a little, he did not think of it; if he ever does so again, ————— 'Tis common for a Father to be serv'd so.

(c) Does as it were personate a Governour, that is, a Father.] Seneca in his 37th Epistle says, That good-Nature spares another's Blood as it would its own, knowing that one Man must not be lavish of another's Life. Diodorus Siculus in Frag. 2. δὲ τὰς ἀμαρτίας αἰσας &c. Not every

nor, that is, a *Father*; in allusion to which St. *Austin*, speaking to Count *Marcellinus* says, *Discharge and perform, Sir, you who are a Christian Judge, the Duty and Office of a kind and religious Father*. *Julian* the Emperor was a great Admirer of *Pittacus's* Maxims, ὅς τὴν συγγνώμην &c. who preferred *Pardon to Punishment*. And *Libanius* in an Oration of his *de seditione Antiochena* says, That he who would be like his Heavenly Father ἀφίης &c. *Must take a greater Delight in forgiving than punishing*.

3. Circumstances too may sometimes fall out so, that it may not only be laudable, but an Obligation in us to forbear claiming our *Right*, on account of that *Charity* which we owe to all Men, even tho' our *Enemies*; whether this *Charity* be considered in *it self*, or as it is what the *Sacred Rule* of the *Gospel* requires at our Hands. And thus, as we have already mentioned, there are some Persons, for whose *Safety*, tho' they assault us, we should wish to lay down our Lives, because we know they are either necessary or very useful for the Common Good of Mankind. If *Christ* would have us undervalue and neglect some Things, rather than quarrel, and contend for 'em in Law; without doubt he would have us neglect much greater Things for the Prevention of *War*, by how much

every one who offends must by all Means be punish'd, but those only who persist in their Crimes without Repentance. St. *Chrysostom* de Statuis vi. καὶ ἐξ ἑωυτοῦ &c. Let all who are Strangers to our Faith, know that the Fear of *Christ* is able to bridle and restrain every Power. Honour your Masters, and forgive your Fellow Servants, that he may have the greater Regard to you, that he may at the Day of Judgment remembering this Tenderness and Humanity of yours, shew you a kind and propitious Countenance. And *Gratianus*, *Caus. 23. Quest. 4.* cites the following Expression out of St. *Austin*, 'Tis not to no Purpose that we use these two Words, a Man and a Sinner together; for if the Sinner deserves Punishment, the Man claims our Pity. See both what follows there, and what we said above, at Chap. 20. § 12. § 26. and 27.

much *War* is more pernicious and destructive than any other *Contest* whatever.

4. St. *Ambrose* says, that to remit something of what's our Right, is not only an *Act of Liberality*, but is also generally much to our *Advantage*. *Aristides* advises the *States* συγχωρεαν &c. to resign and give up matters of *Indifferent Consequence*; and gives this as a Reason ωστερ γδ &c. for you highly extol those private Men who are of so mild a Temper, as to chuse rather to sustain some *Losses* than go to Law. *Xenophon* in the sixth Book of his *Grecian History* tells us σωφρογυν &c. that wise People will not engage in *War*, no; tho' there are important Reasons for it. And *Apollonius* in *Philostratus* πολέμου &c. that *War* is not to be undertaken; even where the *Provocations* are great.

III. 1. As for *Punishments*, it is a Principal Duty of ours, if not as Men, (d) yet certainly as *Christians* to be ready and willing to forgive those *Injuries* that are committed against us, as God forgives us in *Christ*, *Ephes. iv. 32.* τοὺς περι &c. Not to be *Angry* or moved at all at those things, says (e) *Josephus*; for which they who are guilty of 'em are liable to suffer *Death*, is a near Approach to the *Divine Nature*.

III. And particularly must an injured Prince do so.

2. *Seneca* says of a Prince, that he should be more easily prevailed on to pardon *Injuries* done against himself, than those done against others; for as he is far from generous who is only lavish of what is none of his; but he is certainly *Liberal* who takes from his own *Stock* what he bestows upon another. So I cannot call him kind and good-natured, who is easie under ano-

VOL. II.

R r

ther's

(d) Yet certainly as *Christians*.] *Theodosius* was mov'd by *Flavianus* the Bishop, to pardon the *Antiochians* the Crimes they had committed against him, chiefly from these Words of our Saviour, *Father, forgive them, for they know not what they do.* St. *Chrysostom* relates this Affair in his xxth. de *Status*.

(e) *Josephus*.] *Antiq. Hist. ii. 3.*

ther's Affliction, but him, who, when himself is wronged, bears it patiently, and does not fall out into Passion and Resentment; who considers that 'tis the Property of a noble and elevated Spirit to support itself under Injuries at a Time when it has the greatest Power of returning them; and that (f) nothing is really more glorious than an injured Prince, who scorns to take any Revenge. And Quintilian, *We would persuade a Prince to aim at the Reputation of Tenderness and Humanity, rather than to seek the bar'rous Pleasure of being Cruel and Revengeful.* This was the sublimest Character that Cicero could bestow upon C. Caesar, that he was never forgetful of any Thing but Injuries. Livia in her Discourse to Augustus in Dion, speaks thus, τὰς ἀρχοντας &c. 'Tis the Opinion of most Men that Sovereigns ought to bring to Condign Punishment all Offenders against the State; but to forgive those who offend against their own Persons. (g) Antoninus the Philosopher in his Oration to the Senate says, that the Revenge of a Personal Injury looks little and mean in a Prince; for tho' the Punishment be just and deserved, yet it carries along with it the Appearance of Cruelty. St. Ambrose in his Epistle to Theodosius, *You have pardon'd the Antiochians your own Injury.* And Theodoret in his Encomiums on the same Theodosius to the Senate says, ὁτι &c. that a good King should

(f) Nothing is really more glorious than an injur'd Prince, who scorns to take Revenge.] St. Chrysostom speaking in Commendation of Clemency, ἀπαντα πόλ' &c. For this is an Ornament to every one, particularly to People in Power. For since Sovereignty allows a Man to do any Thing, 'tis prodigiously for a Prince's Reputation and Glory, to put a Restraint upon his Passions, and to make the Law of God the Director of his Actions. St. Austin in his civth Letter to Count Boniface, *Remember to forgive soon, if he who has injur'd you ask your Pardon.*

(g) Antoninus the Philosopher.] In Valerius Gallienus's Life of Avidius Cassius.

be above those that offend him, and not only not return their Wrong, but be forward also to do them any kind Office.

3. Aristotle denies that he can be a Man of any Great Spirit who retains in his Breast the Memory of every Ill he receives : Which Cicero expresses thus, Nothing can be more worthy of a Man of Honour, than Clemency and Good-nature. The Holy Scriptures afford us very remarkable Instances of this Noble Virtue in Moses, Num. xi. 12, and in David, 2 Sam. xvi. 7. And this we are especially obliged to, when we are conscious to our selves of some Offence of our own ; or when what is committed against us proceeds from a certain human Frailty that's altogether excusable, or when the Offender gives plain Demonstration of his Sorrow and Repentance. Cicero says, There is a measure to be observed in our Revenge and our Punishments, and I don't know whether (h) the Offender's Repentance be not a sufficient Satisfaction. A wise Man (says Seneca) forgives many a Crime, and will save many an Ill-inclined Person, provided he finds him not incurably Bad. And these are the Reasons which Charity suggests to us for Abstaining from War, a Charity we either owe to, or which we may and ought to bestow upon our Enemies.

IV. 1. Besides it often happens, that it is (i) for the Interest of us and ours to do all we can to

R r 2

decline

IV. A Prince is often to decline going to War both for his own and his Subjects Safety.

(h) The Offender's Repentance be not a sufficient Satisfaction.] Procopius Vandal ii. μεταμελδς &c. When Offenders are seized with Sorrow and Concern for what they have done, the Parties injur'd are commonly induced to forgive 'em.

(i) For the Interest of us and ours.] Procopius Gotth. ii. says, that the Goths address'd themselves to Belisarius in the following Manner, οταν ε αὐτα &c. Since Matters stand thus, the Greatness on either Side, should not out of their own Vanity and Ambition sacrifice their Subjects Safety but prefer what is just and advantageous, not only for themselves, but their Enemies,

decline a *War*. *Plutarch* in the *Life of Numa* acquaints us, that after it had been voted by the *Heralds* that a *War* might justly be undertaken, (k) the *Senate* had a *Debate* whether it was convenient or no. 'Tis said in one of *Christ's* Parables, that if one *King* is going to make *War* against another *King*, he sitteth down first, (the *Manner* and *Posture* of such as deliberate with great *Care* and *Attention*) and considereth whether he be able with *Ten thousand* to meet him that cometh against him with *Twenty thousand*; or else whilst the other is yet a great way off, he sendeth an *Ambassage*, and desireth *Conditions* of *Peace*.

2. (l) Thus the *Tusculans*, by suffering ev'ry Thing, and (m) refusing nothing, merited a *Peace* from the *Romans*. And in *Tacitus* we have, *In vain did the Romans seek an Occasion of quarrelling with the Autunois, who not only, according to the Contributions demanded of 'em, supplied 'em punctually with Money and Arms, but did over and above furnish 'em with Provisions at their own Expence.* (n) So *Queen Amalasuntha* declared positively to *Justinian's* *Embassadors*, that she would not break out into a *War* with him.

3. One may sometimes too moderate the Matter, as *Strabo* mentions that *Syrmus King of the Triballi* did, who deny'd *Alexander the Great* the Liberty of landing upon the *Island Peuce*, and yet at the

(k) *The Senate had a Debate, whether it was convenient or no*] *Diodorus* in *Thucydides* iii. ἡ δὲ δὲ ἀπορῆναι &c. For tho' I pronounce 'em guilty of several unjust Things, I shall not however order 'em to be kill'd. unless I find it for our Interest so to do.

(g) *Thus the Tusculans.*] See *Plutarch* in his *Camillus*.

(m) *Refusing Nothing.*] The *King of the Armenians* in *Severus's* Time did so. *Herodian* mentions it, l. iii.

(n) *So Queen Amalasuntha declar'd positively to Justinian's Ambassadors.*] See *Procopius* *Vandal* ii. and *Goth.* i.

the same time sent him some very valuable and magnificent Presents, in order to make it appear to him, that he did it out of a just *Fear*, and not out of any *Hatred* or *Disrespect* to his *Person*. And what *Euripides* spoke of the Greek Cities, may not improperly be apply'd to any other,

*When by the Senate 'tis decreed for War,
Not one does ever think his Ruin near,
But all of us some other's Death mark out:
In their Debates had they but seen their Fate,
Mad Greece had never fallen by the Sword.*

Think with your self, says *Livy*, not only of your own Strength, but of the Power of Fortune, and the common Hazards of War. And *Thucydides* gives this caution, τὸ πολέμους &c. Consider before you enter into it what unexpected Incidents there are in War.

V. 1. When People are deliberating, they lay before them not only the Subordinate Ends, but the Means too which lead to those Ends. The End we have in view is always some Good, or at least the declining some Evil, which is much the same thing. But those Things which incline us this way, or that way, are not in themselves what we desire, but only what conducts us to it. And therefore, in all our Consultations we should compare not only the Ends with one another, but the Capacity of the Means for bringing about those Ends: For, as *Aristotle* wisely observes in his *Treatise de motione Animalium*, αἱ περὶ τὰς &c. What one proposes by any Action, is of two sorts, either an Advantage or a Possibility. Which Comparison has these three following Rules for its Direction.

V. Rules
of prudence
directing
our choice
of what is
good.

2. The first is, that if the Matter under Consideration appear, morally speaking, to be as much dispos'd to produce Good, as to produce Evil, we may venture upon it, provided the Good partakes

more of the Nature of *Good*, than the *Evil* does of the Nature of *Evil*. This is what *Aristides* means by the Expression, *ὅτ' ἐλαττοῦ* &c. *When the Good is less than the difficulty in procuring it, 'tis best to let it quite alone.* *Andronicus Rhodius*, in his Character of a Man of Bravery says, that he will not expose himself to danger upon every slight Occasion, but when he has Reason of the last Importance for it.

3. The second is, that if the *Good* and the *Evil* which may possibly result from the Thing in dispute are equal, we may undertake the Affair, if there be a greater Tendency in it to *Good*, than to *Evil*.

4. The third is, that if the *Good* and the *Evil* seem disproportionable, and the *Disposition* of the Affair in hand no less disproportionable, we may still venture upon it, (o) if its *Disposition* to produce *Good*, compar'd with its *Disposition* to produce *Evil*, does more considerably exceed that, than the *Evil* it self, compar'd with the *Good*, exceeds the *Good*; or if the *Good* compar'd with the *Evil*, is more considerable than the *Disposition* of the Thing to *Evil*, compar'd with its *Disposition* to *Good*.

5. We have touched upon these Points a little too nicely; but *Cicero* expresses the same in a more plain and familiar way, when he advises us to take care not to thrust our selves into Hazards and Difficulties, where there's no manner of Occasion for it, there being no greater Folly upon Earth than such a Rashness: And therefore in Attempts of any Danger

(a) If its *Disposition* to produce *Good*, compar'd with its *Disposition* to produce *Evil*, does more considerably exceed that, than the *Evil* it self compar'd with the *Good*, exceeds the *Good*] *Narses* in *Procopius* *Gothic* ii. very prudently makes Use of this Rule.

we should imitate the Practice of skilful Physicians, who to their Patients, that are easily curable, administer very gentle Medicines, but in desperate Cases are forced to have Recourse to desperate Cures. He says therefore that 'tis a Wise and Prudent Part to keep off the Mischiefs of a Storm, and particularly if the Good to be obtain'd by getting well rid of it, outbalances the Evil of continuing in suspense, whether we should endeavour this or no.

6. And in another place, Where no great Advantage can accrue to us, if we meet with Success, and the least Miscarriage may be Fatal, what need we run any Risque at all? Dion Prusænsis, in his second Tarsensis, delivers himself thus, ἔγω δεινὸν &c. Suppose this be an unhandsome and unworthy Treatment of us: We must not however, tho' our Usage be unjust, by our Stragling and Contentious Humours expose our selves to farther Inconveniences. And afterwards ὁρῶν &c. As we endeavour to shake off those Burdens, the weight of which is so great that we are not able to bear it; so when we have Shoulders answerable to our Load, and we are loaded with such things that we must either stand under them or something more intolerable; we in this case make our selves as easie as we can. Οὐδὲ μέγαν &c. When our Fears, says Aristides, are greater than our Hopes, is it not time to look about us?

Sicul. 11.

VI. 1. Let what Tacitus relates that the Cities of France consulted about, whether they should chuse Liberty or Peace, be a Precedent for us in this Affair. By Liberty is meant Civil Liberty, that is, an Independent Power of governing themselves by their own Laws; which Power in a Popular State is full and Absolute; but in an Aristocracy, is something limited, especially in such a one where not a Citizen is unqualify'd for a Dignity. But by Peace we are to understand such a one, as by preventing the War prevents the utter Ruin of the

VI. An example directing us in our Consultations about Liberty and Peace, when 'tis to save a State from utter Ruin and Destruction.

whole State; that is, as *Cicero* illustrates this Question in a Greek Passage *ἰὰν &c.* *If the State be in danger of being entirely undone.* As when suppose, having examin'd and consider'd thoroughly the Consequence of the Matter, we can find nothing but the sad Presage of a total Destruction; as was the Condition of *Jerusalem* besieged by *Titus*. 'Tis obvious what *Cato* would say in this Case, he *who had rather die, than be subject to one Man.* And agreeable to this Resolution is that of the Poet:

*How easily may
A Man's own Hand from Slav'ry set him free?*

And several other Expressions to the same Effect.

2. But *Right Reason* suggests quite another Thing; she tells us that *Life* is far preferable to *Liberty*, as being the Foundation on which all *Temporal Blessings* are built, and the *Occasion* of those that are *Eternal*, whether you consider one or t'other, with Respect to a *single Person* or a *Community*. And therefore *God* himself imputes it as an Act of his Favour, that he did not cut off his People with the *Sword*, but made them *Captives*. And in another place, he perswades the *Hebrews* by his Prophet (*p*) to surrender themselves

(p) *To surrender themselves into the Hands of the King of Babylon lest they should die by Famine and Pestilence.* Guido Blandratenfis, in Orat. ad Mediolan. in Gunther.

*Omnia securi pro Libertate feremus,
Sed Libertatem &c.*

*There's Nothing we wou'd n't hear for Liberty,
Of Life secure. But a Madman only
Would throw away his Life for Liberty.
To undertake by Choice what's certain Death
Is Vanity, and not that generous Fire
The sober Love of Freedom kindles.*

selves into the Hands of the King of *Babylon*, lest they should die by Famine and Pestilence. Wherefore tho' the Ancients highly extoll'd

— *What Brave Capua did*
When by Hannibal block'd up :

Yet is it a Conduct very far from deserving any such Commendation, no more than the *Means* that lead to it.

3. For *utter Destruction* in such Circumstances is to be look'd on as the greatest of Evils. *Cicero* in his second Book of *Invention* lays down this as a *Case of extreme Necessity*, that the *Capitineses* were forced to surrender themselves to *Hannibal*, though their Necessity had this Exception, (q) unless they chose rather to starve. And *Diodorus Siculus's* Judgment of the *Thebans*, who liv'd in *Alexander the Great's* Time, was τοῖς παρρησιασθῆναι &c. That (r) with greater Courage than Prudence they had drawn upon themselves the entire Ruin of their Country.

4. And *Plutarch* pronounces against *Cato* and *Scipio* (before mentioned) who after *Cæsar's* Victory at *Pharsalia* would not submit to him, αἰτίαν ἔχουσιν &c. That they were highly to blame for destroying

(q) Unless they chose rather to starve.] 'Twas *Anaxilaus's* Excuse, who surrender'd *Constantinople* for Want of Provisions, That Men are to hold out against Men, but not against Nature. So says *Xenophon*. And *Procopius* Gotth. iv. § 38 ἐπαρρησιασθῆναι &c. People don't commend a Person for making Death his Choice, as long as there's any Hope of getting over the Danger of it.

(r) With greater Courage than Prudence.] The same Author, when he has given an Account of the War the *Athenians* engag'd in after *Alexander's* Death, says, that in the Opinion of Folks of the better Sense, they had pretty well consulted their Glory, but had vastly mistook their Interest: because 'twas a Danger they hurried themselves into without any Manner of Necessity for it; no ways warn'd by the unhappy *Theban* Fate,

destroying so many Brave Men in Africa, without any occasion for it.

5. What I have spoke in relation to *Liberty*, I would have understood of other *desirable* Things, if a *Greater* Mischief, upon our not complying, be more justly or at least equally expected. For as *Aristides* well observes, *The Custom is to save the Vessel, with the loss of the Cargo, and not by throwing the Passengers over-board.*

VII. That he ought to forbear pursuing a Punishment by Force of Arms, who is not very much Superior in Power.

VII. We are also particularly to take Notice, that no Prince should ever make War upon another, who is of equal Strength with himself, on the account of inflicting Punishment; for as the Civil Magistrate is supposed to have greater Power than the Criminal; so should he also who attempts to revenge Injuries by Arms, be stronger than him he attacks. And indeed 'tis not only Prudence or Affection for his Subjects, that requires him to forbear engaging in a dangerous War but very often Justice it self, that Political Justice, which from it's very Nature, does no less oblige a Prince to take care of his Subjects, than it does the Subjects to obey their Prince. From whence it follows (as Divines do also teach us) that a King who undertakes a War upon frivolous Reasons, or to inflict some needless Punishments and such as will involve his Subjects in a great deal of Trouble, is obliged to make up the Damages they suffer thereby; for though he can't be accus'd with any Injury done to his Enemies, yet may there be a heavy Charge laid against him of wronging his Subjects, by plunging them in so much Misfortune and Misery, upon such an Account as this. *Livy* says, that War is justifiable in those who are under a necessity of being engaged in it, and that Arms are warrantable, when we have no hopes but in our Arms. This is what *Ovid* fain would have when he says, *Fast. 1.*

Let

*Let the Soldier wear
No other Arms than what defensive are.*

VIII. (s) There is but one Case then, and that very seldom happens, wherein War cannot nor ought not to be forborn; and this is, as *Florus* expresses it, *When the Conditions offer'd us for Equitable and Good are more Rigorous and Severe than War it self.* One runs into Dangers, says *Seneca*, *When one apprehends the same or perhaps more Inconveniences if one sits still.* Which *Aristides* thus explains: τὸτε ὅχι &c. 'Tis then adviseable, though the Event be uncertain, to prefer an Hazard, when to be at quiet is evidently worse. 'Tis Prudence, says *Tacitus*, to exchange a miserable Peace for a War, when, as the same Author has it, either our Courage will procure us our Liberty, or if we lose the Day we are just as we were before; or when (as *Livy* speaks) - Peace with Slavery is more insupportable than War with Freedom. But not if (according to *Cicero*) it be likely, that being conquered you shall be proscribed, or being Conqueror you will be a Slave still.

VIII. War not to be engaged in, but out of Necessity:

IX. Another Time for going to War is, if upon a just Estimation we have Right on our side, and, which is the chiefest Thing of all, if we have Strength sufficient to maintain it. This is what *Augustus* meant when he said, that War was not to be undertaken, but

IX. Or when there's an Important Reason join'd with a very Favourable Opportunity.

(f) There is but one Case then, and that very seldom happens, wherein War cannot, nor ought not to be forborn.] *Servius* upon that Passage in the 10th *Æneid*.

*The Gods from Heaven survey the fatal Strife,
And mourn the Miseries of human Life.*

Because, says he, there is no Reason upon Earth so just as to oblige you to enter into a War.

but when there appeared a greater Prospect of Advantage, than fear of Loss; and here may be applyed that which Scipio Africanus and L. Æmilius Paulus used to say of an Engagement, that we should never fight, (t) but in Cases of extream Necessity, or of some very considerable Advantage given us. And this Maxim will particularly take place, when there's a Prospect of gaining our Point (u) by the Terror of our Reputation, with little or no hazard on our side. This was Dion's Advice for delivering Syracuse. And in Pliny's Epistles there's this Passage: He vanquish'd 'em by the Fear of him, which is the handsomest Victory in the World.

X. The Mis-
eries of War
display'd.

X. War, says Plutarch, is a terrible Thing, and brings along with it an Ocean of Calamities and Insolence. And St. Austin very wisely expresses himself thus: If I should attempt to speak of what Mischiefs and Massacres, what Misery and Hardships are occasioned by War, I should not only want Words, but not know when to put a Period to so large a Field of Discourse; but a Prince of Prudence and Thought (say they) will engage only in a just War; as if when he reflects upon himself to be a Man, he will not on the contrary heartily lament, that there could ever be a Necessity of entering into any just Wars, because unless he were satisfied of the Justice of them,

(t) But in Cases of extream Necessity.] Plutarch in his Gracchus's τὸ ἀνευ τῆς &c. 'Tis neither like a good Surgeon nor a good Politician to cut and hack, unless there's the last Necessity in the World for it. 'Tis Marcius's Expression in Zonaras, μὴ δεῖν ὁπλὰ βασιλεὺς κτεῖν, ἕως ἐπιθνήσκειν ἐξόν, a Prince ought never to think of War, as long as he may enjoy Peace. St. Austin in his First Letter to Boniface: Peace should be our Choice, but War the Result of Necessity alone; that so God may deliver us from that Necessity, and preserve us in Peace.

(u) By the Terror of our Reputation.] The Lion scorning to use the Weapons Nature gives him, for a long Time defends himself by his Terror only, and does as it were bid you do your worst. This Passage is in Pliny's Natural History, l. 8. c. 16.

them, he could not have had any hand in them, and from hence it's plain, that a Prince of Prudence and Thought would by his good Will have no Wars at all; for it is the Injustice of the adverse Party that thrust him into Wars, which are not only Just but Inevitable; which Injustice (x) every Man ought to bewail, as 'tis human Injustice, though it did not oblige us to Arms. Whoever therefore considers such great, such horrid, such barbarous Ills, must do it with Concern, and must needs confess that it is the height of Misery; but whoever can endure them, or make them the Objects of his Thoughts, without Grief and Emotion, that Wretch is still more Miserable, because he counts himself happy in an inhuman Insensibility. And in another place he tells us, That the Good never engage in War but out of Necessity, whereas the Wicked take Delight in it. Maximus Tyrius tells us, τὸ τῶν πολλῶν μὲν &c. That though there were no Injustice in a War, yet the very Necessity of it is deplorable. And again, φαίνεται &c. 'Tis certain that good People make War only when compelled to it, but the wicked do it out of Choice.

2. To

(x) Every Man ought to bewail.] The Lacedemonians in an Harangue of theirs, extant in Diodorus Siculus, l. 13. θεωρῶντες τοὺς ἐν τῷ πολέμῳ &c. Seeing so many Animosities, and so many other shocking Incidents in War, we think it our Duty to declare both to God and Man, that we are not any Ways the Authors of these Things. Plutarch in his Numa, τὶ ἔν φησὶ &c. If any one says to me, Has not Rome improv'd by Wars? He asks me a Question that requires a long Answer. 'Tis true, she has improv'd by 'em in the Opinion of those who make Improvement to consist rather in Riches, and Luxury, and Empire, than in Safety and good Nature, in Justice and Contentment. Stephanus a Physician says in Protopius, Persic. ii, to Chosroes the Persian King, ἐκὼν ὃ κρᾶτισ βασιλεῦ, By being employ'd in Massacres and Basties, and enslaving of People, you may probably, great Prince, acquire some other Titles, but you can never by such Methods be reputed Good. Add to this, a famous Passage in Guicciardin, l. 16.

2. To which we may add that of *Seneca*, that one Man should not be profuse of another's Blood. *Philistus* gave *Alexander* this Advice, that he should have a desire of Glory, but not to indulge his Ambition so far as to become the common Pest and grand Mortality of Mankind; meaning that Massacres and Devastations of Cities were Acts that most resembled a Plague, and that nothing was more worthy of and Heroick in a King, than to have a tender Regard for the Universal Health of all, which Health depends upon their living in Peace.

3. If according to the Constitution of the Hebrews, he who killed a Man, though involuntarily, was obliged to fly for't: If God would not suffer *David* to build him a Temple, (y) because he had been the occasion of so much Bloodshed, tho' his Wars are said to be Just: If among the ancient Greeks 'twas a Custom, that they who had defiled their Hands with human Blood, tho' without any Fault of theirs, had need of Expiation; what Person living, and particularly if he be a Christian, does not see how Unfortunate and Fatal a Thing War is, and with what Endeavours we should strive to keep our selves from it, though it were Just? And 'tis certain, that among the Christian Greeks

(y) Because he had been the Occasion of so much Bloodshed. in *Josephus* l. 7. c. 4. He would not suffer him, a Man who had been engag'd in so many Wars, and who was stain'd with Blood, tho' it was the Blood of his Enemies. These are *Josephus's* Words, l. 7. c. 4. where there follow several others to the same Purpose. And *Pliny* l. 7. c. 25. after having related the Battles of *Cæsar* the Dictator, says, I can't indeed think it is for his Reputation, that he was under the Necessity of doing Mankind so much Injury. *Philo* in his Life of *Moses*, l. 2. c. 10. For tho' the Laws allow us to murder an Enemy, yet whoever kills any Man, tho' justly, tho' in his own Defence, tho' forced to it, seems to be guilty of Blood, on the Account of that original and common Relation we bear to one another, and therefore such Homicides were oblig'd to some Purgations to expiate the reputed Crime.

Greeks a Canon was for a long while observed, by vertue of which whosoever killed his Enemy, in what War soever, was (z) for a time excommunicated.

CHAP. XXV.

Of the Causes for which War is to be undertaken on the Account of Others.

I. 1. **A**BOVE, when we treated of those whose Prerogative it is to make War, we laid down and explained that according to the *Law of Nature*, every Man is authorized to maintain not only his own Right, but also that of another Person's: And therefore those *Reasons* that can justify a Man in undertaking a War for himself; the very same can justify those who espouse the Cause of others.

1. War may be justly undertaken by a Prince for the Interest of his Subjects.

2. But our main and chiefest Care should be, (a) for those who are under our *Direction* and *Management*, whether in a *Family* or in a *State*. For they are as it were a *Part* of him who governs, as we shewed there. Thus the *Hebrews* took up Arms under the Command of *Joshua* in behalf of the *Gibeonites* who had surrender'd themselves up to them. Our *Ancestors*, says *Cicero* to the *Romans*, often commenced a War, if but one of their *Merchants* and *Mariners* had been ill dealt with; and in another Passage, How many Wars, (says he) have our

Fa-

(z) For a Time.] Three Years. Zonaras, Niceph. Phoc.

(a) For those who are under our Direction and Management.] Procopius, Persic. ii. 2. 30. 6. under &c. For if a Man does no one any Hurt himself, he is not therefore just, unless he's willing too to protect those under his Charge from others Injuries.

Fathers engag'd in, upon their Hearing that any Roman Citizens had been injur'd, any Master of a Vessel detain'd; or any Trader plunder'd. The same Romans; tho' they refused to take up Arms in behalf of their Allies, did yet, as soon as ever those Allies had thrown themselves under their Protection and so became their Subjects, think themselves oblig'd to do it. The Campanians address'd the Romans thus: Tho' you won't guard our State against the Violence and Injults of its Enemies, yet surely you will protect your own. And Florus tells us; that the League which these People had before was ratify'd, and made more inviolable upon their Surrendry of all they had to the Romans. For Livy says, that they made it a Point of Honour and Fidelity, not to fail and desert such as gave themselves up to their Disposal.

II. But it is not always to be so undertaken.

II. A Prince is not always obliged to take up Arms, whatever just Reasons any particular Subject of his may have; unless *All* or *Most* of his Subjects would be Sufferers on that Account. For 'tis a Governor's Business to have greater Regard for the *Whole*, than the *Part*; and the larger the *Part* is, so much the more does it approach to the Nature of the *Whole*.

III. Whether an Innocent Subject may be delivered up to an Enemy for preventing some manifest Danger.

III. 1. And therefore if one Subject, tho' altogether innocent, be demanded by the Enemy to be put to Death, (b) he may no doubt on't be abandon'd and left to their Discretion, if it is manifest, That the State is not able to stand the Shock of that Enemy. Ferdinand Vasquez argues against this Point; but if one does not so much mind his Expressions, as his Meaning

(b) He may, no doubt on't, be abandoned, and left to their Discretion.] See the Patriarch Nicephorus's Advice given to Michael Langaba, about delivering up some Deserters to the Bulgarian General, as an Article of the Peace, where you have in Zonaras the following Period, *απεϊσον* *Ενας* &c. judging it much better for a few, than an immense Multitude to suffer.

ing, one may find that what he intended was, that such a Subject should not rashly be forsaken, provided there were any Hopes of protecting him. For he tells us there a Story of a Regiment of *Italian* Foot, who deserted *Pompey*, before Matters were grown desperate; upon their Assurance of Security on *Cæsar's* Side, which Act he very justly censures.

2. Whether an *inoffensive* Subject may be surrendered up into the Hands of the Enemy, to save the *State* from imminent Ruin, is a Point much controverted *now* among the *Learned*, as it was in *Former Times* when *Demosthenes* invented that remarkable Fable concerning the *Dogs*, whom as an Article of *Peace*, the *Wolves* demanded the *Sheep* to give 'em up. *Vasquez* is not the only Person who is against this, but *Sotus* too, even he whose Opinion *Vasquez* blames as bordering upon *Perfidiousness*. But *Sotus* would have it that such a Subject is obliged to surrender up *himself* to the Enemy: And this is what *Vasquez* denies for this Reason, because it is not required by the Nature of a *Civil Society*, which every one enters into for his own Safety and Advantage.

3. But from hence no more is to be gather'd than that no Subject is by any *Right* strictly so call'd obliged to this, but that an *Affection* for his Country will not let him do otherwise. For there are many Duties, not of *strict Justice* but of *Charity*, which are not only very commendable, (as *Vasquez* owns) but which cannot be dispensed with without a Crime. Such a Duty does this seem to be which obliges every one to prefer the Lives of a vast Number of innocent Persons before *his own*. This is what *Praxithea* in *Euripides's Erechtheus* designs by saying,

Ἐίπερ γ' ἀρεθμὸν οἶδα &c.

*If I know any thing at all of Numbers,
Any Thing of More and Less, (c) a single House
Can ne'er a Public Mis'ry exceed or equal,
However Great its own Misfortunes be.*

And thus *Phocion* sollicitated *Demosthenes*, and others, after the Example of *Leus's* Daughters and (d) the *Hyacinthides*, to be ready to suffer Death, rather than that on their Account their Country should be ruined. *Cicero* in his Oration for *P. Dextius* says, *if sailing with my Friends it should chance that a Crew of Pyrates should attack us and threaten presently to sink our Ship unless they delivered me alone up unto 'em, if my Companions should refuse, and declare that they would sooner perish than surrender me, I should rather throw my self into the Sea, to save the rest, than bring those who express'd so tender a Concern for my Welfare into any great Danger of their Lives, much less to certain Death.* And in his Third Book *de Finibus* he tells us that *A Man of Goodness and good Sense, who conforms himself to the Laws, and understands the Duty of a Subject, has always a stricter Regard for the Publick Advantage, than for any particular Person's; nay than for his own.* And in *Liwy* we read the following Passage of certain *Molossians*: *I have often heard indeed of People who have laid down their Lives for their Country, but these are the First that were ever known to judge it reasonable that their Country should suffer for them.*

4. But

(c) ————— *A single House*

Can ne'er a publick Mis'ry exceed or equal] ἔ δίκαιον πρὸς ἅ-
κην τὸ ὅλον μῆκος εἶναι, 'tis not fair that the whole should become an
Appendage of the Part. The Passage is in *Philo*, at the End of the
Second Book of *Moses's* Life, where there are several Things very
well worth the Reading.

(d) *The Hyacinthides*] See *Apollodorus* in *Bibliothec.*

4. But granting all this, there still remains a Doubt, *whether he can be forced to do that, which he is in Duty bound to.* *Sotus* is against it, bringing the Instance of a *Rich Man* who is indeed by the Laws of *Compassion* oblig'd to relieve the *Poor*, but yet is under no *Compulsion* to do it. But we are to observe that the Case is not parallel between *Subjects* and *Subjects*, and between *Sovereigns* and their *Subjects*. For one *Equal* cannot compel another, unless it be to that, which by the strictest *Right* he owes him. But a *Sovereign* can oblige a *Subject* (e) to other Things also which any *Virtue* directs, because that is a Power included in the Right of *Sovereignty* as 'tis a *Sovereignty*. Thus in time of great *Scarcity* *Subjects* may be compelled to bring out their Corn, and therefore upon the Question in Hand it seems much more likely that a *Subject* may be forced to do what *Charity* demands of him. So *Phocion* before mentioned, pointing to one *Nicoles* a Friend he passionately lov'd, declared that Things were come to such an Extremity, that if *Alexander* demanded him, he would vote for the delivering him up.

IV. Next to our own *Subjects*, or indeed equally with 'em, are our *Allies* to be defended, when such a *Defence* is stipulated in the Articles of *Treaty*; and this, whether they have entirely given themselves up on the Account of such a Protection, and so depend upon it, or whether it be agreed on for a *mutual* Help and Security. *He who guards not his Allie*, says *St. Ambrose*, *from Wrong*, if it is in his Power to do it, is as much to blame, as he who

IV. That we may lawfully undertake a War in behalf of our Allies, whether the Alliance be equal or unequal.

S f 2

wrongs

(e) To other Things also, which any *Virtue* directs] So among the *Lucans* there was a particular Punishment for Persons extravagant, among the *Macedonians* for the ungrateful, and among both the *Lucans* and *Athepians* for the idle. Add here what's at B. i. ch. 15 § 9.

wrongs him himself. But such *Articles* do not reach so far, (as 'twas before observ'd) (f) as to involve us in an *unjust War*; and for this Reason the *Lacedemonians* laid before their *Allies* the *Justice* of their *Cause*, to be determined by their *Opinion* of it; and so were the *Romans* for having the *Grecians* Judgement upon their *War* against *Nabis*. But we may add here that an *Ally* is not obliged to give his Assistance, when there are no Hopes of *Success*, because Alliances are entered into on the Account of making some *Advantage* by 'em, and not to People's *Prejudice*. And we may protect one *Ally* against another of our *Allies*, unless there's a Clause in a *Former League* to the contrary. Thus might the *Athenians* have come in as *Auxiliaries* to the *Corcyreans* if their Cause had been *Good*, against the *Corinthians* tho' their more ancient *Allies*.

V. And also for our Friends :

V. (g) A *Third Reason* for War is the Protection of our *Friends*, whom tho' not under any formal *Promise* yet upon the Score of *Friendship* we are under an Obligation of assisting, provided we bring not our selves into any great Trouble, and Inconveniencies by it. Thus *Abraham* took up Arms in behalf of his Kinsman *Lot*. And the *Romans* charged the *Antients* not to presume to meddle

(f) As to involve us in an unjust War.] See Simler de Republica Helvetiorum : If the Lord makes War upon any one, and it be known to be just, or not known to be otherwise, the Vassal is obliged to assist him. But if it be visible that he enters into it without any Grounds for so doing, he shall help him to defend himself, but not to offend the other. l. ii. de Feudis. c. 28. at the End.

(g) A Third Reason for War is the Protection of our Friends.] There's an old Oracle to this Purpose :

Ἀνδρὶ φίλῳ θνήσκοντι, &c.

Your dying Friend, tho' near, you ne'er assisted;
Be gone, you Wretch, no Answer's for you here.

dle with the *Greeks* to plunder them, because *Related* to the *Italians*. And the same *Romans* very often actually engag'd in *War*, or at least threaten'd so to do, not only for their *Allies*, whom they were bound to defend, but for their *Friends* too.

VI. The last and most extensive Reason of all for assisting others is that Relation that all Mankind stand in to each other; and this alone is sufficient. One Man, says *Seneca*, is born to help and relieve another. And in another Place, A wise Man will, as often as it lies in his Power, turn away a Misfortune. *Euripides* in his *Supplices*:

VI. And indeed for any body whatever.

*The Rocks Protection to the Beasts afford,
The Sacred Altars to the Trembling Slaves;
And for one Suff'ring Town a safe Retreat
Another Town provides.*

That Courage, says *St. Ambrose*, which defends the Weak, is Justice in Perfection; but of this we have already treated.

VII. 1. Here it is an Inquiry whether one Man is obliged to defend another from Injuries, or one People another. (b) *Plato* is for having him punished, who does not keep off a Violence that's offer'd another. The same the *Ægyptian* Laws provided for; but yet 'tis plain, that in case there appears any Danger, we are not bound to do it; for a Man may prefer his own Life and Safety before that of others. And thus do I think that that Expression of *Tully* is to be construed, *He who does not take the injured Person's part, and oppose the Violence done him, if he can, is as much to blame as if he forsook his Pa-*

VII. Yet it may be let alone without any Crime, if one's afraid for himself, or that he must kill the Agg-ess-
sor.

8 f 3

rents,

(b) *Plato* is for having him punish'd, who does not keep off a Violence that's offer'd another.] And the *Jews* too, according to *Moses de Kotzi*, [rec. jub. 77, 80, vel. 144, 145.

rents, his Country, or his Friends: By, if he can, we are to understand, with his own Convenience: For he himself tells us elsewhere, that there are some Folks, perhaps, whom 'tis no Disreputation not to protect. Sallust in his History has these Words, *All who when their own Affairs are as they could wish 'em, are invited to a Confederate War, should thoroughly consider whether they may without any Hazard still be at Quiet; and then, whether what they are solicited to, be a thing that's just, safe and honourable, or whether 'twould not be a Disgrace to 'em to comply.*

2. Nor should we overlook this Saying (i) of Seneca, *I will run to any Man's Assistance who is just a perishing, provided I can do it without Ruining myself; or if I must be Ruin'd, that my Ruin may be the Purchase of some Person of prodigious Merit, or of some Affair of the last Importance.* But he is not then bound to do it, if the *Assaulted* cannot be rescued without killing the *Aggressor*. For if he who is set upon value the *Invader's* Life above his own, as we elsewhere have told you he might, he who is really of Opinion that he does so or that he ought to do so, is no ways to blame; especially, since on the *Aggressor's* side there is a greater Danger of an *Irrecoverable* and an *Eternal* Loss.

VIII. 1. 'Tis another Question, *Whether we have a just Cause for War with another Prince, in order to relieve his Subjects from their Oppression under him.* True it is, that from the first Institution of *Civil Societies*, the *Governors* of every State acquire'd

VIII. Whether that War is just which is made for the Defence of another's Subjects, explained by Distinctions.

(i) Of Seneca.] The Passage is in his Second B. *de Beneficiis*, c. 15. There's another not unlike it upon the same Subject, l. c. 10. I will defend a Man of Worth, even at the Expence of my own Blood, and will run any Hazard for him: And indeed I should not grudge to strain my Lungs for a Person of his Merit, if my Noise and Outcry could deliver him out of the Hands of Rogues. See what's above, B. ii. c. ii. § 8.

quir'd some *Peculiar* Right over their respective Subjects: As *Euripides* says to the *Heraclidæ*:

Εἴναοι Νῆστρον &c.

*We, who this City do inhabit, can
Our selves dispense our Justice.*

Nor do the following Verses imply any thing else:

*That Spatta beautifie which is your Share,
Upon Mycene I my Care shall fix.*

And *Thucydides* amongst the Tokens of *Royalty*, puts the *Supreme Power of Justice*, as well as a *Power of making Laws*, and constituting *Magistrates*. To which alludes that of *Virgil*:

*The Realms of Ocean and the Fields of Air
Are mine, not his; by fatal Lot to me
The Liquid Empire fell, and Trident of the Sea.*
Dryd.

And that of *Ovid* not unlike it:

(k) *Nor may the Gods the Acts of Gods rescind.*

And that also of *Euripides*,

*The Rule and Custom of the Gods is this:
That none must e'er another's Will oppose.*

S f 4

The

(k) *Nor may the Gods the Acts of Gods rescind.*] in the Third Metamorph.

*Nor is one God allow'd e'er to repeal
What another God has done.*

The Reason of this is, as St. *Ambrose* very justly explains it, τὰς σφετέρους &c. left by intruding into each others Provinces they should quarrel among themselves. And the *Corinthians* in *Thucydides* reckoned it very equitable, (1) that every one should punish his own; and *Perseus* in his Discourse to *Martius*, refuses to make any Apology for himself, for what he had acted against the *Dolopes*; For, says he, I only put my own lawful Authority in Execution, since they were my Subjects, and under my Command; but those Reasons may take place where Subjects are really in Fault, or, if you please, when 'tis uncertain whether they are or no. For to this End was the Distribution of Empires first made.

2. But if the Injustice be visible, as if a *Busris*, a *Phalaris*, or a *Thracian Diomedes* exercise such Tyrannies over Subjects, as no good Man living can approve of, the Right of Human Society shall not be therefore excluded. Thus *Constantine* made War against *Maxentius* and *Licinius*; (m) and other Roman Emperors against the *Persians*, or threatened them with it at least, unless they left off Persecuting *Christians* on the account of their Religion only.

3. And indeed tho' it were granted that Subjects ought not, even in the most pressing Necessity, to take up Arms against their Prince (which is what those very Gentlemen who are such Advocates for the Power and Prerogatives of the Crown, are, as we

(1) That every one should punish his own] St. *Austin*, l. ii. de libero Arbitrio: For 'tis no Argument of Justice to punish People who are under another's Jurisdiction, because 'tis a Proof of a Man's Goodness to do Strangers a Kindness. *Procopius Vandal.* i. τὴν ὑπαρχουσαν &c. 'Tis proper that every Man should look after his own Province, and not concern himself with other People's Affairs.

(m) And other Roman Emperors against the *Persians*] You have such another Instance at the End of *Fredegarus de rebus Pipini*.

we shew'd you, still in suspense about) we should not yet be able to conclude from thence, that *others* might not do it for 'em. For whenever the Obstacle to any Action arises from the *Person*, and not from the *Thing*, then what *one* is not allowed to do *himself*, another may do for him; supposing the Case be such, as one Man may be serviceable in it to another. Thus for Instance, a *Guardian*, or any other, may carry on a Suit of Law for a *Minor*, because he is not capable of doing it himself; and a *Council* may without any Order and Commission plead for a *Person Absent*. Now what prohibits the *Subject* to resist, does not at all proceed from the *Cause*, which is the same in a *Subject*, as in him who is not so; but from the *Quality* and *Circumstance* of the *Person*, which *Quality* does not pass to *others*.

4. And therefore, according to *Seneca*, I may make War upon a Man, tho' he and I are of different Nations, if he disturbs and molests his own Country, as we told you in our Discourse about *Punishments*, which is an Affair often attended with the Defence of the *Innocent*. Ancient and Modern History indeed informs us, that *Avarice* and *Ambition* do frequently lay hold on such Excuses; but we cannot from this infer, that what is *usurped* by the Wicked and Injurious, does therefore cease to be Justice. *Pirates sail on the Seas, and Thieves wear Swords.*

IX. 1. But as we have already shewed, that those Military *Alliances* which are entred into, (n) with the Design and Promise of *Assistance* in any War, without regarding the *Merit* of the Cause, are altogether *Unlawful*; so there is no Course of *Life*

IX. That it is very unjust for People to enter into Confederacies, or to list themselves Soldiers for Money, without any Regard to the Reasons of the War.

(n) With the Design and Promise of Assistance in any War whatever, without regarding the Merit of the Cause.] See Simler again upon this Subject,

Life more abominable and to be detested, than that of *Mercenary Soldiers*, who without ever considering the Justice of what they are undertaking, fight for the Pay; who

By their Wages the Goodness of the Cause compute.

Which *Plato* proves by *Tyrtaeus*. And this is the very thing that *Philip* objected to the *Ætolians*; and *Dionysius Milesius* censured the *Arcadians* for in the following Terms, ἀγορὰ πολέμου &c. *War's become a Trade, the Arcadians live upon the Greeks Misfortunes, and Groundless Wars engage 'em on any Side.* The Case of a Soldier, as *Antiphanes* describes it, is really a very miserable one,

Ὅς ἐνεκα τῆ ζῆν ἐρχεῖτ' ἀποθανέμεν,

(o) *Who to support his Life to Death resorts.*

And *Dion Pruseensis* argues thus, καίτοι τῆ ζῆν &c. *What is there in the World that we have more Occasion for, or what can be more valuable to us than Life, and yet even this do People throw away for Money.*

2. Did

(o) *Who to support his Life to Death resorts.*] They procure at the Hazard of their Lives. what will destroy their Lives, says *Seneca*, *Natur. l. c. 18.* And *Plautus* in his *Bacchides*.

Who sell their Lives for Gold.

So *Gumther*:

'Tis Money raises Troops: Soldiers follow
Where ever Int'rest leads, no Party know,
But that which pays 'em well, us'd to change Sides
For Change of Sal'ry. This or That's their Foe,
Whom he who lifts 'em commands to think one.

2. Did they *sell* only their own Lives 'twere no great matter; but they sell also the Lives of many an harmless *inoffensive* Creature: So much more Odious than *Hangmen*, (p) by how much it is worse to kill without a Reason, than with one *Antisthenes* used to say, that a *common Executioner* was abundantly better than a *Tyrant*; for the one put *Malefactors* to Death only, but the other the *Innocent*. The Elder *Philip* of *Macedon* said to that sort of Men *τὰς τεθρῆας* &c. who got their livelihood by Fighting, that War was Peace to them, and Peace War.

3. War is no proper *Employment*, nay, it is so monstrous and horrid, that nothing but mere *Necessity*, or perfect *Charity*, can make it lawful, as may be gathered from what has been said in the foregoing Chapter. To bear Arms is, in *St. Austin's* Judgment, no Crime, but to bear Arms on the account of Booty is *Wickedness* with a Witness.

X. Nay, 'tis so to fight for Pay, if that be the sole and principal View; when at the same time 'tis otherwise very justifiable to receive Pay, for who (says *St. Paul*) ever goes to War at his own Cost, *I Cor. ix. 7.*

X. To bear Arms for Pay only, or for the meer sake of Booty, is a Crime.

(p) By how much it is worse to kill without a Reason than with one.] *Seneca. Natur. v. 18.* What can a Man call this but Madness? To carry our Dangers about us. and to invade People we know Nothing of, to be angry without any Provocation. to ruin and destroy all we meet with, and like so many wild Beasts, to murder a Man we have no Manner of Hatred against.

C H A P. XXVI.

Of the Reasons that justify those who under another's Command engage in War.

I. *Who are they who may be said to be under another's Jurisdiction.*

I. **W**E have already treated of those who are at their own Liberty and Disposal; there are others, who are in Circumstances of Obedience and Submission, such as *Sons* in Families, *Slaves*, *Subjects*, and likewise every Individual Member of a State, if compared with the *Body* of the State of which he is a *Member*.

II. *What they must do in Case they are allowed to deliberate, or to have a free Choice.*

II. But those too, if they are allow'd to deliberate themselves, or it be left to their own Choice, either to have *War* or *Peace*, they ought to follow the same Directions, which were prescribed for those, who according to their own Discretion have Authority to make *War* in behalf of *themselves* and *others*.

III. *They must not take up Arms, tho' commanded, if they are persuaded that the Cause is bad.*

III. 1. But if they have *Orders* given them to take up *Arms*, as is usual, then if it plainly appears that the *War* is *unlawful*, 'tis their Duty not to meddle in it. 'Tis the Doctrine not only of the *Apostles*, (a) but of *Socrates* also, that we should obey God rather than Man. And we have (b) the Opinion of the *Hebrew Rabbins* for not obeying

our

(a) *But of Socrates also.*] This we are taught by *Plato* in his *Apology*, and by *Apollonius*, who oppos'd to Nero's Edict that Verse of *Sophocles*.

Οὐ γὰρ τὶ μοι Ζεὺς ἦν ὁ κελεύσας τόδε,

For this was never by Jove enjoin'd me.

(b) *The Opinion of the Hebrew Rabbins.*] Which Opinion *Josephus* ascribes to 'em, *Antiq. Hist.* 17. *Δαυματὸν δὲ εἶδεν &c.* Nor is

it

our Prince, when he enjoins any thing repugnant to God's Law. 'Twas St. Polycarp's Saying upon his Death-bed, *δεδιδ' αγγελια &c.* We have learnt to pay to Governments, to the Powers ordained by God, all due Honour, provided that Honour does not obstruct or hazard our eternal Salvation. And St. Paul's Advice is, Children obey your Parents (c) in the Lord, for this is right. Upon which St. Jerom says, 'tis a Sin in Children not to obey their Parents, but because Parents may command something that's Ill, he added, in the Lord. And (d) of Servants he subjoins, When their Master, according to the Flesh, bids 'em do any thing different from the Injunctions of their Lord, according to the Spirit, they are not to obey. And in another place, They are subject to Parents and Masters

it any Wonder, if we look upon the Laws which Moses, from the Mouth, and by the Direction of God, writ down and left us, to be more indispensable and worthy our Regard than your Decrees. Add to this, Rabbi Tanckuma, cited by Drutius upon the Acts.

(c) In the Lord.] St. Chrysostom explains this Passage in the Lord, thus *τῶν ἐν ὁῖς μὴ ὑποτασσέσθαι Θεῷ.* that is in those things you don't offend God by. And in his Letter ad Patrem fidelem, *ὃ γὰρ δὴ μίσητος &c.* For 'tis no small Reward that's design'd us if we honour our Parents, whom we are commanded to regard as our Lords and Masters, and to obey both in Words and Actions, provided they order us Nothing that's prejudicial to Religion. 'Tis thus that you must understand that of St. Jerome, per calcatum perge Patrem, Go on tho' you trample upon your Father, which is spoken by way of Declamation, and is taken from a Thief's Speech in Seneca; and thus too what you have in St. Ambrose de Virginitate, and in St. Austin Epist. 38 ad Lætum, and in the Fourth Canon of the Arabic Exposition of the First Council of Nice.

(d) Of Servants.] St. Chrysostom 1 Cor. 7. 24. *ὃ γὰρ οἱ σὺν &c.* For the Servant too has his Limits prescrib'd him by God. And 'tis particularly injoin'd him how far to go, beyond which he must never pass. For when his Master commands him nothing disapprov'd of God, he is to be punctually follow'd and obey'd, but no farther. And Clemens Alexandrinus speaking of a good Wife, says, *πάντα τῷ ἀνδρὶ &c.* She complies with her Husband in ev'ry Respect, nor does she ever do any thing against his Inclinations, unless 'tis what she thinks may very much conduce to Virtue and her own Salvation.

sters only in such things as are not against the Commandments of God. For that same Apostle had declared before, that every Man, whether he was Bond or Free, should receive from God according to his Works. And Tertullian tells us, that the Apostle's Precept (e) of obeying Magistrates, Princes and Public Powers, is sufficient Instruction for us to Obedience, but only so far as 'tis agreeable to the Discipline of the Christian Religion. In the Martyrology Silvanus the Martyr says, On this account do we condemn the Roman Laws, that we may observe the Commands of God. To Creon in Euripides making this Demand,

Is it not fit my Orders be obey'd?

Antigone replies,

No; if you order what's not fit.

And Musonius says, that if any one does not comply with his Father, (f) the Magistrate, or his Master, in such Commands as are scandalous and unlawful, he is neither Disobedient, Injurious nor Wicked.

2. Gellius does not allow that we should do every thing a Father Commands. For what, says he, if he should command me to betray my Country, to murder my Mother, or to do any other such horrid and
impious

(e) Of obeying Magistrates] See some illustrious Examples, both of Punishment and Commendation, in 1 Sam. 22. 18, 19. 1 Kings 18. 4, 13. 2 Kings 1. 10, 12, 14. And among Christians, Manuel and George refus'd to execute the Order for killing *Augusta*, *Nicetus* in his Life of *Alexius*, *Mannet's* Son.

(f) The Magistrate.] There are Two noble Instances among the Heathens, of some who would not obey their Princes in a dishonest Action, that of *Japinian* is sufficiently celebrated, and the other is of *Helpidius* in *Ammianus* 21. And *Severus* would not pardon those who had kill'd a Senator, tho' by the Emperor's Order. See *Xiphilinus*.

impious Act? And therefore the middle Opinion seems the best and most secure, that in some Cases we ought to obey him, in others not. And (g) Seneca the Father says, we are not to yield Obedience to all sorts of Commands. And (h) Quintilian, There is no Necessity that Children should do all that their Parents bid them. There are several things which cannot be legally done; for Instance, if a Father commands his Son to pass a Judgment against his Conscience; to witness that which he knows nothing of; to Vote just so and so in Parliament. If you should order me to fire the Capitol, to seize on the Castle, I might then safely answer, This is what ought not to be done. Seneca says further, Neither is it lawful for us to command all things; nor are our Servants bound to obey us in all things; they shall not obey us, when we command them to do any thing against the State; they shall not assist us in our Crimes. Sopater says *ἡ δὲ αἰ* &c. We must obey a Father, and we do well to obey him, provided his Commands are according to the Laws; but if they are not so, 'tis by no means proper. (i) Stratocles was formerly laughed at for aiming to constitute a Law at Athens, that whatever pleased King Demetrius should be reckoned an Act of Piety towards the Gods, and of Justice among Men. Pliny in his Epistle to Minutius says, that he had made it his Bu-
 Bu-
 Bu-

(g) Seneca the Father.] l. i. contro. i.

(h) Quintilian.] And in another Place: We must not do ev'ry Thing even that our Parents bid us. For at that Rate, nothing would be more pernicious than receiving of Favours, if Favours oblige us to any kind of Service.

(i) Stratocles was formerly laugh'd at.] Such was the Bond that Andronicus Comnenus demanded of Basilus Comnenus, *ἐν ἐκείνῳ τῷ χρόνῳ* &c. That in his Pontifical Office he should do every Thing that Andronicus had a Mind to. however unlawful that was, and that on the other Hand he should do nothing but what Andronicus pleas'd.

Business to demonstrate, (k) that *Obedience was in some cases a Crime*.

3. Those *Civil Laws* that readily pardon slight Offences, are favourable too to those who are under a *Necessity* of obeying, but not in all Cases. For they except those *Crimes* which are of a very heinous and flagitious Nature, being apparently and in themselves wicked and detestable, as *Tully* speaks; or as *Asconius* explains it, such barefaced Villanies as one ought of one's self, and from the common Notion of Things, without having any Occasion for the Opinion of a Lawyer in the matter, at the first View to recoil and fly from.

4. *Josephus* relates from *Hecateus*, that the Jews who bore Arms under *Alexander the Great*, could neither by Scourges, nor any other Abuses, be compelled, together with the other Soldiers, to bring Earth for the Reparation of the Temple of *Belus* at *Babylon*. But we have an Instance more suitable to the Affair in hand in the *Thebean Legion*, which we spoke of before; and in *Julian's* Soldiers, of whom *St. Ambrose* writes thus; *Julian the Emperor, tho' an Apostate, had Christian Soldiers under him, to whom when he said March in Defence of the State, they instantly obey'd; (kk) but* when

(k) *That Obedience was in some Cases a Crime*] *Tertullian de Anima*: He who commands a Thing must certainly be severely punish'd, when even he who only acts in Obedience to his Order is liable to suffer for it. And in his Treatise *de resurrectione carnis*. Since human Justice is reckon'd the Persecutor, the more Cognizance it takes of the Instruments of a Fact, leaving 'em without either Favour or Prejudice, to the Punishment or Mercy the Authors themselves are entitl'd to. See *Gail. de Pace publica*. l. i. c. 4. n. 14.

(kk) *But when he said, Draw upon the Christians.*] For *Julian* did not altogether abstain from offering Violence to the *Christians*, especially when he thought he had some Colour for it. He is call'd in *St. Jerome's* Letter to *Nepotianus*, *Julian the Butcher of the Christian Army*. And *St. Austin* l. i. c. 32. relates, that the Persecution at *Antioch* was begun in his Reign, and that a certain Youth was put to the

when he said Draw upon the Christians, then they owned no other King but the King of Heaven. So we read of some Provost-Marsbals who being converted to Christianity, chose rather to die, than be concerned in the Execution of Christians.

5. 'Twill amount to the very same thing, if a Man is throughly perswaded that what he is commanded to do is unlawful; for to him it continues to be so, 'till he is convinced of the contrary, as appears by what has been said above.

IV. 1. But suppose he be not satisfied one way or other, must he forbear, or comply? The general Opinion is that he should comply; neither should that celebrated Maxim prohibit him, *Act not at all in a doubtful Case*; for he who is scrupulous in Speculation, may have no Scruple at all in Practice: Because he may assure himself, that in dubious Matters he is to yield Obedience to a Superior. And indeed it must be owned, that in several cases the distinction of the Judgment into Speculative and Practical, is very useful. The Civil Laws of other Nations, as well as of the Romans, do (1) not only indemnifie those who obey in such a Case, but will allow of no Civil Action against them: *He, say they, does the Damage, who commands*

IV. What they must do, if they are not satisfied, whether the Cause be good or bad.

VOL. II.

T t

mands

the Rack. In the Martyrologies, there's Mention made of St. Elizabeth a Scot. and Thirty three of his Companions beheaded by Julian's Order, between the Cities of Toul and Grand. See also Joannes Antiochus in Exc. in Mss. Peires. St. Austin Epist. i. ad Bonifacium, cited by Gratian Caus. xi. Quæst. 3. Julian was an unbelieving Prince; was he not an Apostate and an Idolater? Christian Soldiers serv'd an Infidel Emperor, but when they came to the Cause of Christ, they acknowledg'd no Sovereign but Him in Heaven: When he was for having 'em worship and offer Incense to Idols, they preferr'd God before him.

(1) Not only indemnifie those who obey.] St. Chrysostome de Providentia iii. πολλοὶ γὰρ ἀρχόντων &c. Many a Magistrate being impeach'd of putting People unjustly to Death has been acquitted but Nobody ever indicted the Executioner, who was employ'd in the Murder, tho' the very

mands it to be done; but he's in no fault who is oblig'd to obey. The Necessity impos'd on us by those above us, and such Reasons as these, are an *Excuse* sufficient.

2. And therefore *Aristotle* himself in the fifth of his *Nicomachia*, reckons the Slave of an unreasonable Master among those who do what's unjust, but not unjustly: And says, that 'tis the Author of the Action who is the unjust Person, because a Slave is not in a Capacity of deliberating, according to the Proverb,

Ἡμῖσι τ' ἀρετῆς ἀποαίρει δέλιον ἡμάρ,

The Day a Man's a Slave he loses half his Wit.

And this other like it,

Ἡμῖσι γάρ τε νόσ &c.

*Half Understanding Jove allots to those
Whom he appoints to lead a Servile Life.*

And that which *Philo* uses:

Δεῖλ' ὡς πρὸς καὶ μέτεσί σοι λόγος.

Thou'rt a Slave: (m) Thou no Reason hast.

And

every Person whose Hands committed it, nor ever inquir'd after him, because the Necessity he was under excuses him, as well by the Dignity of his Principal as his own Subjection. And *Ulpian* out of *Celsus*, says, that a Servant is in no Manner of Fault who only obeys his Master L. 2. D. de Nox. Act. He is suppos'd to do it against his Inclinations, who only complies with his Father's or his Mother's Order. D. de regulis Juris, and *Cujacius* there. *Seneca*: There's no Force upon a Person who is willing. Add the Lombard Law, l. i. tit. 4. ch. 2. *Mithridates* dismiss'd *Attilius's* Freed-man unpunish'd, tho' guilty of an intended Murder against him, and the Sons of one who had revolted from him. *Appianus* *Mithridatic*. And *Tiberius Gracchus* was acquitted from the Crime of the *Numantian* Confederacy, because 'twas by another's Command that he had offended.

(m) *Thou no Reason hast.* *Themistius* in his Ninth Oration says, that Princes are like Reason, Soldiers like Anger.

And to the same purpose is that of *Tacitus*, *The Gods have made the Prince Supreme and Absolute, leaving Subjects the Glory to Obey.* And the same Writer informs us, that *Tiberius* cleared the Son of *Piso* from the Imputation of *Sedition*, because his Father had laid his Commands upon him, whose Commands he could not refuse. A Servant, says (n) *Seneca*, is not a Judge of the Legality of his Master's Commands, 'tis his Business to execute them.

3. And *St. Austin's* Opinion in this point of Military Service, is very particular; for he says, *If it happens that a good Man bears Arms even under a Sacrilegious King, he may safely venture to fight when he is commanded, if consulting the Peace of the State, he is fully certain, that the Commands enjoined him are not repugnant to the Laws of God, or is not certain whether they be so or no: For in this case the King perhaps may be guilty on the account of his commanding what's ill, but the Soldier is justified in his Obedience.* And in another place, *When a Soldier in obeying his Officer who has a Right to command him, kills a Man, (o) the Laws of his Country acquit him of Murder; nay, if he does not do it he is reputed a Rebel; whereas had he done it of his own Head, he had been guilty of Blood.* So that that very Fact which would have punish'd him without an Order for it, would also punish him for neglecting that Order. And therefore 'tis an Opinion commonly receiv'd, that as to Subjects a War may be just on

T t 2 both

(n) *Seneca.*] De Controversiis, iii. 9.

(o) *The Laws of his Country acquit him of Murder.*] The same *St. Austin* in his First Book de libero Arbitrio. If killing a Man be Murder, Murder may sometimes be committed without a Crime; for a Soldier who kills his Enemy, and a Judge or his Executioner who kills a Malefactor, and he who unawares and without Design lets a Weapon fall out of his Hand, don't seem to me to be any Ways to blame, when they kill a Man: Nor indeed is it usual to call such People Murderers. *Gratian* has inserted this in *Caus. 23. Quest. 5.*

both sides, that is, exempt from *Injustice*; agreeable to which is that of the Poet,

*To know in War which side the juster is,
Is none of our Business.*

4. There is however some Absurdity in this. And *Adrian*, who was the last *Cisalpine* Pope, (p) maintained the contrary, which is prov'd not from that particular Assignment which he acknowledges, but by this more convincing one, that *he who doubts in Speculation, ought in his Practice to make choice of the safer side.* And the safer side is this, not to go to War at all. The *Esseni* are mightily commended, because, among other things, they took an Oath $\mu\eta\ \beta\lambda\alpha\psi\epsilon\iota\ \delta\epsilon\sigma\iota$ *to hurt no Body, tho' commanded to do it.* The *Pythagoreans* followed their Example, who, as *Jamblicus* records, abstain from War for this Reason, $\phi\omicron\nu\omega\nu\ \delta\epsilon\sigma\iota$ *that War introduces Murders and gives 'em the Sanction of Law.*

5. The Danger of *Disobedience* on the other hand ought not to be much an Obstacle: For when both are uncertain, he does not contract any Guilt who sticks to that which he knows is the less Criminal; for if the *War* be *unjust* 'tis no *Disobedience* to decline it. *Disobedience* in such cases is in its own Nature a less evil than *Homicide*, especially than taking away the Lives of many innocent People. The Ancients tell us, that when *Mercury* was charged with the Death of *Argus*, his Defence was, that he had *Jupiter's* Command for the doing of it, yet that the Gods did not presume to acquit him. Nor does *Marzial* altogether excuse *Pothinus*, one of *Ptolemy's* Guards, in the following Lines:

Less

(p) Maintain the contrary] There is an Instance of those who follow this Opinion in *Scafnaburgensis*.

*Less Criminal indeed Photinus is
Than Antony, for what he did he had
His Master's Order for, but th' other's Fact
Was by his own Instigation done.*

Nor is that which some produce to the contrary of any great Importance; that if this should be allowed, the *State* would soon be *ruined*, because 'tis generally not convenient to let the People into the Reasons of the Prince's Designs. For tho' this be true of the *Perswasive*, yet 'tis not so of the *Justifiable* Causes of War which should be made plain and demonstrable, and consequently such as should and ought to be laid before all the World.

6. What *Tertullian* said a little too indistinctly perhaps of *Laws*, may be very justly applyed to *Proclamations* for War: Nor can a Subject discharge his Obedience to the *Laws* as he ought, if he does not know what it is the Law punishes: No Law should it self only be conscious of its Justice, but should communicate it too to those it expects a compliance from. For indeed a Law is very much to be suspected, which does not care to submit to an Examination, but 'tis highly unjust if it exerts its Power before it has been examin'd and enquir'd into. *Achilles*, in *Papinius*, to *Ulysses* who is inviting him to a War, says;

*Tell me the Causes of the Grecian War,
I fain would know 'em to encrease my Rage.*

And *Theseus* in the same Poet,

*March chearful on, let the Justice of your Arms
Advance your Courage.*

'Twas *Propertius's* Observation, that

*The Cause does raise or sink the Soldier's Heart,
If that be bad, his Resolution's gone.*

Parallel to this is that of the *Panegyrist*, *So great a share in War has a good Conscience, that Victory is rather owing to the Justice of the Cause, than to the Courage of the Soldiers.* And accordingly some Men of Learning interpreted the word יָרֵךְ *jarech*, he armed (q) *Gen. xiv. 14.* in this Sense, that *Abraham's Servants* were before the Engagement thoroughly inform'd by him of the *Justice* of his Arms.

7. And therefore *Declarations of War* used, as we shall shew you by and by, to be made *Publick*, and the *Reasons* for it precisely express'd, that so all Mankind, as it were, might judge of the *Justice* of it. *Prudence*, (according to *Aristotle*) is indeed a *Virtue peculiar* to the *Prince*, but *Justice* belongs to ev'ry *Man*, as he is a *Man*.

8. But *Adrian's Opinion* before mentioned, seems absolutely to be relied on, if the *Subject* is not only in *Suspence*, but is by probable Arguments more enclined to believe that the War is *unjust*; especially if he be to take up Arms *offensively*, and not *defensively*.

9. And 'tis probable too, that an *Executioner* who is to put a condemned Malefactor to Death, ought to be acquainted with the *Merits* of the *Cause*, either by being present at the Tryal, or by the *Criminal's Confession*, (r) in order to satisfy himself that that Person *deserv'd Death*; and this

(q) *Gen. xiv. 14.*] Some strain the Word יָרֵךְ *Trained*, to the same Sense, and interpret it, *Informed by him.* Herod, in an Harangue to the *Jews* after the Massacre in *Arabia*, is introduced by *Josephus*, saying, βέλους δὲ πρῶτον &c. *I am willing first to shew you how justly we enter'd into this War, being necessitated to it from the Insults of our Enemies.* For if you understood this, it must needs be a very great Incitement of your Courage.

(r) *In order to satisfy himself that that Person deserved Death.*] And therefore *Saul's Servants*, who had more Honesty and Goodness in 'em

this is still usual in some Places, and is what the *Hebrew Law* has an Eye to when it enjoins that when a Malefactor is to be stoned, the *Witnesses* shall throw the *first Stone*.

V. 1. But if sufficient *Satisfaction* cannot be given to the *Subjects*, by explaining to 'em the Reasons of the War; 'tis a good Prince's Duty to impose upon them rather some extraordinary Taxes, than a Personal *Military Service*; especially when there are others who are ready to serve him, whose Intention (be it good or bad) a just King may make use of, as God sometimes does of the *Devil* and the *Wicked*; and as a Man is in no Fault, if when pressed with Poverty, and in extreme Want, he borrows Money from a Gripping *Usurer*.

2. Nay, tho' the *Justice* of the War is not at all to be questioned, yet we cannot judge it reasonable, that *Christians* should be forced to carry Arms against their Consent; since to abstain from War, even when 'tis lawful to fight, is reckoned a greater Piece of *Sanctity*, a *Sanctity* which has been constantly required from the *Clergy* and from *Penitents*, and what is to all others recommended in several Manners. *Origen* makes this Answer to *Celsus*, upbraiding the *Christians* for their Refusal of going to War, *To those who, being Strangers to our Religion, would command us to take up Arms for the State, and to kill Men, we thus reply, They who are your Idols Priests, and the Ministers of your reputed Gods, do keep their Hands undefil'd on the account of their Sacrifices, that they may offer 'em up to your pretended Deities with innocent Hands, Hands*

V. *That 'tis an Act of Clemency and Goodness in such a Case for a Prince to dispense with the Service of his scrupulous Subjects and in the lieu of it to impose upon them some extraordinary Taxes.*

'em than *Doeg*, would not kill the Priests of *Nob*. without being acquainted with the Circumstances of the Case, 1 *Sam.* xxii. 17. And *Ahab's* Third Captain refus'd to hurt *Elijah*, 2 *Kings* i. 13. &c. And some Executioners converted to *Christianity*, did for the future renounce that Office as a very dangerous Employment. See the *Martyrology* and *Bede*, l. i. c. 7.

with Murder unpolluted. Nor in War are your Priests ever lifted. Now if there be any Reason for this, then certainly you should reckon those, when others are in the War, to be in their way under Arms too, who whilst, as the Priests and Worshippers of God they preserve their Hands indeed pure from Blood, do yet with earnest Prayers contend with Heaven both for them who are engag'd in a just War, and for him who governs justly. In which Passage Origen calls ev'ry Christian a Priest, according to the Language of the Holy Writers, Rev. i. 6. 1 Pet. ii. 5.

VI. When Subjects may lawfully take up Arms in an unjust War.

VI. 1. But yet I am of Opinion that it may sometimes so fall out, that not only in a doubtful War, but even in one manifestly Unjust, Subjects may lawfully take up Arms in their own Defence. For since an Enemy, tho' carrying on a just War, cannot have any True and Internal Right to put to the Sword such Subjects as are Innocent and have no share in stirring up the War, unless it be in his own necessary Defence, or by Consequence, and contrary to his Intentions; (for such Subjects are not liable to Punishment,) it follows, that if it evidently appears, that the Enemy comes upon 'em with that Resolution of not giving such hostile Subjects any Quarter, when if he pleases he may, then are those Subjects allowed by the Right of Nature to act in their own Defence, a Right which the Law of Nations has not depriv'd 'em of.

2. Nor can we even then say, that the War is just on both sides; for the Question here is not about the War, but a certain particular Action, which Action, tho' his, who has otherwise a Right to make a War, is yet unjust, and is therefore justly to be opposed and repell'd.

The End of the Second Book: